IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 604

DIVISION 1287 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, ET AL., *Appellants*

v.

STATE OF MISSOURI, *Appellee*

On Appeal From the Supreme Court of Missouri

BRIEF FOR APPELLANTS

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OPINIONS BELOW

The opinion of the Missouri Supreme Court is reported at 361 S.W. 2d 33 (R. 158-193). No opinion was written by the Circuit Court of Jackson County, Kansas City, Missouri. The opinion of a three-judge federal district court in a proceeding pertaining to the

same controversy as the instant one, expressing that court's decision to abstain from adjudication of the federal questions presented on this appeal in deference to initial state determination, is reported at 50 LRRM 2942 and is reprinted in the Jurisdictional Statement at pages 45a-54a.

JURISDICTION

The Missouri Supreme Court affirmed as modified an injunction issued by the Circuit Court of Jackson County, Kansas City, Missouri, restraining a strike in a proceeding brought in accordance with the procedure prescribed by a Missouri statute known as the King-Thompson Act. The final judgment of the Missouri Supreme Court was entered on October 8, 1962 (R. 198). Notice of appeal was filed in that court on October 18, 1962 (R. 199). The Jurisdictional Statement was filed in this Court on November 20, 1962, and probable jurisdiction was noted on January 14, 1963 (R. 202). The jurisdiction of this Court to review by appeal the judgment of the Missouri Supreme Court is conferred by 28 U.S.C. § 1257(2).

STATUTES INVOLVED

The King-Thompson Act (Ch. 295, Rev. Stat. Mo., 1949) is set out in full in Appendix A (*infra*, pp. 1a-11a). Relevant provisions of the Labor Management Relations Act, 1947 (61 Stat. 316, 29 U.S.C. § 141, *et seq.*) are set out in Appendix B (*infra*, 12a-19a).

QUESTIONS PRESENTED

1. Whether the King-Thompson Act, which establishes a special type of compulsory hearing, fact-finding, and recommendation procedure applicable to labor disputes in privately owned public utilities and

which makes "unlawful" "any strike or concerted refusal to work for any utility or for the state after any plant, equipment or facility has been taken over by the state. . . . as a means of enforcing any demands against the utility or against the state," is in conflict with and pre-empted by the Labor Management Relations Act, 1947.

2. Whether the King-Thompson Act, by prohibiting a public utility strike without substituting a compensating equivalent for it, offends substantive due process in violation of the Fourteenth Amendment of the United States Constitution and imposes involuntary servitude in violation of the Thirteenth Amendment of the United States Constitution.

STATEMENT

After an impasse had been reached in collective bargaining negotiations between appellant Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America (herein called the Union) and Kansas City Transit, Inc. (herein called the Company), the transit employees voted to and went on strike to cause the employer to accede to their terms. Upon the basis of the threatened strike, the Governor of Missouri invoked the King-Thompson Act and took possession of the property of the Company; after the strike began an injunction to restrain its continuance was sought and obtained in accordance with the injunctive procedure of the King-Thompson Act. The federal questions presented on this appeal were first raised in the Circuit Court of Jackson County by motion to dismiss (R. 8-11), in the answer (R. 131-132), and at the trial (R. 122), and were thereafter urged on appeal to the Mis-

souri Supreme Court (Br. pp. 2, 12-46).[1] The underlying subsidiary facts, relevant to appellants' claim that the King-Thompson Act is invalid on federal grounds, may be summarized as follows:

A. The Interstate Business of Kansas City Transit, Inc.

The Company is a Missouri corporation with its principal office and place of business at Kansas City, Missouri. It transports passengers by bus in the States of Kansas and Missouri. It operates under a certificate of convenience and necessity issued by the Public Service Commission of Missouri and a like certificate issued by the Kansas State Corporation Commission. (R.13.)

The Company has "one line that operates exclusively in the State of Kansas; . . . certain lines that operate exclusively in the State of Missouri; and then the rest of the lines are interstate operating between both states" (R. 13). The Company's annual revenue received from the bus transportation of passengers approximates $8,600,000 (R. 14). Of this sum, 77 per cent is derived from transporting passengers wholly within the State of Missouri, 7 percent is derived from transporting passengers wholly within the State of Kansas, and 15 percent is derived from transporting passengers between Missouri and Kansas (R. 14). On a normal work day the average number of passengers carried by the Company on the total system is about 150,000 (R. 14). Of this number, 115,000 travel exclusively within Missouri, 10,500 travel exclusively

[1] "Br." refers to the brief filed by appellants in the court below. All briefs in the court below and a letter submitted in lieu of a reply brief have been certified by the clerk of the court below and transmitted to the clerk of this Court.

within Kansas, and 24,500 travel interstate between points in Kansas and Missouri (R. 16).

The total round trip route miles of the Company's passenger transit system are about 496 miles (R. 16). 415 of these route miles are located in Missouri and 81 in Kansas (R. 16). Of the total round trip mileage, 150 round trip miles constitute continuous interstate routes running between Kansas and Missouri, 330 round trip miles constitute routes running exclusively within Missouri, and one route of 16.78 round trip miles runs exclusively within Kansas (R. 17-18, 29-30). The Company owns 401 busses (R. 18). It operates 104 on the interstate routes, 234 on routes exclusively within Missouri, and eight on the route exclusively within Kansas (R. 18-19).

Of the Company's total employment of 950 persons, 817 are within the bargaining unit represented by the Union (R. 20, 30). Of the employees within the bargaining unit, 640 are bus drivers and 170 are maintenance employees (R. 18, 20); 665 live in Missouri and 150 in Kansas (R. 74). The bus drivers are part of the transportation department comprised of two divisions, both located in Kansas City, Missouri; the maintenance employees are part of the maintenance department, comprised of a garage and shop, each located in Kansas City, Missouri (R. 19-20). Whether the bus driver operates an interstate route, a Kansas route, or a Missouri route, he reports to work and begins his journey at one of the two divisions at Kansas City, Missouri (R. 19-20). Busses are not assigned to a particular route but operate interchangeably on all routes; maintenance of busses is similarly not segregated; a maintenance employee can work on any bus (R. 20).

In addition to scheduled bus transportation, the Company charters busses to persons for use on special occasions, from which it derives an average monthly revenue of four or five thousand dollars; while not exclusively so, charter service operates interstate (R. 21). Furthermore, before June 1957, the Company operated a freight switching service; since that time the Company contracts with another party to operate that service, from which the Company derives a monthly revenue of four or five hundred dollars; two interstate railroads are served by the switching connections (R. 22-23).

The Company annually spends about $1,450,000 for fuels, materials and supplies (R. 23). Much of these have an extrastate origin (R. 23-24). All of the 401 busses owned by the Company were manufactured in states other than Kansas or Missouri and were delivered to the Company in Missouri from other states (R. 24).

The National Labor Relations Board has found, and the Company in the proceeding before the Board has admitted, that the Company "is engaged in commerce within the meaning of the National Labor Relations Act." *Kansas City Public Service Co.*, 47 NLRB 1, 2.[3]

B. The Labor Dispute and the Prohibition of the Strike

The employees represented by the Union in collective bargaining consist basically of bus operators, mechanics, service men, and cleaners and janitors (R. 66). The National Labor Relations Board on February 19, 1943 certified the Union as the representative

[3] Kansas City Transit, Inc., is the same business entity that was formerly known as Kansas City Public Service Company. The change of name took place about May 25, 1960. (R. 12-13.)

of these employees and others within a defined bargaining unit, and the Union has been their representative from that time (R. 66, 138-142). The Company and the Union entered into their first collective bargaining agreement in 1943, and agreements between them have since existed (R. 67).

The most recent agreement was for a term from November 1, 1959 through October 31, 1961 (R. 67, def. ex. 5, p. 3). On August 15, 1961, the Company notified the Union of its desire to terminate the agreement (R. 68). On August 30, 1961, the Union notified the Company of its desire to negotiate changes in the agreement, and identified the changes it proposed (R. 67). The Union sent copies of its notification to the Federal Mediation and Conciliation Service and to the Missouri State Board of Mediation (R. 67-68). On September 29, 1961, the Union filed a notice of dispute with the Federal Mediation and Conciliation Service, Missouri State Board of Mediation, and the Kansas Department of Labor (R. 68). The sixty-day notice of proposed changes sent to the Company and the thirty-day notice of dispute sent to the federal and state agencies were dispatched in accordance with the requirements of section 8(d)(1) and (3) of the Labor Management Relations Act, 1947.

Negotiations between the Company and the Union began on September 19, 1961 (R. 68). An impasse was reached about October 13, 1961 (R. 68). The subjects in dispute were wages, vacations with pay, group insurance, pensions, disability allowances, sick leave, a different system of work day for all maintenance employees, a profit sharing plan, a cost of living plan, and others (R. 68-69). On October 19, 1961, the Federal Mediation and Conciliation Service began to attempt

to mediate the dispute and negotiations since then have been conducted with its assistance (R. 69).

On October 30, 1961, with the federal mediators present, the Chairman of the Missouri State Board of Mediation attended the negotiation session scheduled for that day and he continued thereafter to sit in on the negotiations (R. 69, 49-50). On October 31, 1961, the Governor of Missouri wired the Union urging it to "accept the services of the full membership of the State Board of Mediation forthwith to hear the most important issues and make recommendations for settlement" (R. 143, 70). On November 1, 1961, the Union wired its response, informing the Governor of its willingness to "accept the mediation efforts" of the state agency "provided that such efforts do not include hearings which result in recommendations" (R. 143, 70). On November 6, 1961, the Chairman of the State Board notified the Company and the Union of his intention to assemble the full Board, and on November 8, 1961, the Board convened (R. 69, 52). Orally and in writing, at the meeting of November 8, the Union stated that, as ground rules for a successful proceeding, the State Board should act in a mediatory capacity only, "without any hearing of a public nature" and without "recommendations, public or otherwise" (R. 69-71, 52-54, 144-146). The Union "has always felt that negotiations cannot be properly conducted in the newspapers or in the public" (R. 70). The State Board declined to commit itself to the method of proceeding requested by the Union, and the Union then withdrew from participation in the meeting of November 8 (R. 70-71, 52-54, 144-146). Thereafter, on November 11, 1961, the State Board issued a public written recommendation for settlement, proposing a wage increase

only, all other unresolved issues to be dropped (R. 54-56).

Meanwhile, on October 31 and November 1 and 2, an impasse having been reached in negotiations and the Company having refused to arbitrate the unsettled issues (R. 71, 52, 47-48), the Union conducted a strike vote by secret ballot (R. 71). Of the 817 employees eligible to vote, 775 cast ballots, 681 voting for the strike, 74 against, and two ballots were blank (R. 71). The 42 who did not vote failed to do so because they "were home sick in bed or in the hospital or out of town on vacations" (R. 72).

Section 295.180 of the King-Thompson Act provides that the Governor of Missouri is authorized "to take immediate possession" of a public utility, "after his investigation and proclamation that there is a threatened or actual interruption of the operation of such public utility as the result of . . . a threatened or actual strike, . . . and that the public interest, health and welfare are jeopardized, and that the exercise of such authority is necessary to insure the operation of such public utility. . . ." *Infra*, pp. 8a-9a. In accordance with this provision, on November 13, 1961, the Governor issued a proclamation that the threatened strike against the Company required him to exercise his authority to take possession of it in order to assure its operation (R. 132-133, 37). On the same date, the Governor issued Executive Order No. 1 stating that "I, hereby take possession of the plants, equipment, and all facilities of the Kansas City Transit, Inc., located in the State of Missouri, for the use and operation by the State of Missouri in the public interest, effective at 11:59 o'clock, P.M., Central Standard Time, Monday,

November 13, 1961" (R. 134-135, 37). Still the same day, the Governor issued Executive Order No. 2, designating the Chairman of the Missouri State Board of Mediation as his agent to take possession (R. 136-137, 37). Section 295.200.1 of the King-Thompson Act makes "unlawful," after a utility has been "taken over," "any strike or concerted refusal to work . . . as a means of enforcing any demands against the utility or against the state." *Infra*, pp. 9a-10a.

At midnight November 13, 1961, the Union struck the Company and picketed its various premises (R. 72). The strike and picketing were discontinued in the evening of November 15, 1961, as a result of the issuance by the Circuit Court of Jackson County, Kansas City, Missouri, of a temporary restraining order, continued in effect after trial pending final decision (R. 127), enjoining "any work stoppage, refusal to work and strike against the State of Missouri or Kansas City Transit, Inc." (R. 7, 72). During its continuance the strike and picketing had been peaceful (R. 72).

On two occasions previous to 1961, the Governor of Missouri, pursuant to the King-Thompson Act, took possession of the Company as a result of a threatened strike by the Union (R. 73). The period of seizure on the first occasion lasted from April 1950 to December 11, 1950, and on the second from November 6, 1957 to March 6, 1958 (R. 73). No actual strike occurred at either previous time after possession was taken (R. 73-74).

C. The Character of the Possession of the Company Taken by the State of Missouri

Possession of the Company consisted of the performance of no acts other than the delivery to its President of the Governor's Proclamation and Executive Orders No. 1 and 2 (R. 38-39). Executive Order No. 2 provides in part that "All rules and regulations of the aforesaid utility governing the internal management and organization of the company, and its duties and responsibilities, shall remain in force and effect throughout the term of operation by the State of Missouri" (R. 137, 37).

The employees of the Company are not, and will not be, employees of Missouri (R. 39, 62-65). The employees are not paid by Missouri; Missouri does not contribute to their social security or unemployment compensation benefits; Missouri does not pay their workmen's compensation claims (R. 39-41). These payments are made by the Company (*ibid.*). Missouri does not direct the employees as what to do or where to report for work (R. 41-42); it does not hire, discharge, or discipline them (R. 42); it does not control any aspect of the employment relationship or consult with the Company concerning it (R. 42).

Missouri does not and is not authorized to expend any of the Company's money (R. 43). Missouri does not possess the Company's bank accounts, sign its checks, or collect its revenue (R. 43-44). No reports are made to Missouri, and none have been requested, concerning the Company's receipt of its funds (R. 44). Missouri does not make purchases for the Company or pay its bills (R. 44). No property of the Company was actually conveyed, transferred, or otherwise turned over to Missouri (R. 44).

Missouri does not participate in the management of the Company; Missouri is not consulted by the Company's Board of Directors or officers as to the conduct of the business (R. 44-45). Management of the Company remains exclusively with its officers and Board of Directors (R. 45). There has been no change of any kind in the conduct of the business by the Company (R. 45).

D. The Character of the Actual and Apprehended Jeopardy to the "Public Interest, Health and Welfare" as a Result of the Strike Against the Company

During the two-day strike, the Mayor of Kansas City, Missouri, called for group riding in private cars (R. 109), and maximum occupancy of taxicabs (R. 110). Most people got to work (R. 102, 29). The judgment of responsible police officials on the flow of traffic was that " 'We had a few problems as we usually do but they were straightened out quickly. We had traffic supervisors in the field all over the city watching the situation. They reported that everything seemed to be moving smoothly. The principal tie-ups occurred again briefly in the vicinity of 31st and Main Streets and at 31st and The Paseo but we had enough men assigned to those areas that we got things moving quickly. We kept extra traffic patrolmen on duty' " (R. 120-121). Had the strike continued the City would have eased any traffic problem by requesting institution of a system of staggered hours by which business firms release employees from duty at different times (R. 110, 101, 95).

In answer to the question, "Would you say, sir, that the prin y economic effect [of a transit strike] would be upon retail sales in the downtown area of Kansas

City?", the Mayor of Kansas City, Missouri, replied (R. 113):

> That is definitely correct. It would be advantageous to shopping centers; it would certainly hurt the hard core of the city which is known as downtown Kansas City, our large stores doing a retail business. I do not think that a transit strike would in anyway affect distribution or wholesale in any fashion, only in minor ways. [See also, R. 84, 85-86, 87-91, 95, 108.]

The Mayor further stated that "Police stations would continue to operate; hospitals would continue to operate; fire stations would continue to operate . . ." (R. 114). Approximately normal functioning of public utilities like light, gas, and telephone could be expected (R. 114). And the Mayor concluded that industrial plants, barring inconvenience, would operate substantially normally (R. 114).

E. The Injunction Issued by the Circuit Court and Its Affirmance by the Missouri Supreme Court

The petition for injunction was filed with the Circuit Court of Jackson County on November 15, 1962 (R. 1-6). The temporary restraining order enjoining the continuance of the strike was entered the same day (R. 7). Trial of the prayer for a temporary injunction was set for November 27, 1962 (R. 7), and on that day appellants filed their motion to dismiss (R. 8-11). Trial was held on November 27 and 28 (R. 7, 65). On November 28, the temporary restraining order was continued in effect pending further order (R. 127). On December 7, appellants filed their answer (R. 129-132). On December 22, the parties stipulated that the evidence received at the preceding trial "may be considered by the court on both the temporary and permanent

injunction" (R. 127). On February 12, 1962, the Circuit Court entered its decree adjudging that appellants "be . . . permanently enjoined and restrained from continuing, inciting, supporting and participating in the work stoppage, refusal to work and strike against the State of Missouri" (R. 128). On appeal the Missuri Supreme Court on October 8, 1962 adjudged that the decree "be modified so that the trial court retains jurisdiction of the cause, and as modified, be in all things affirmed, and stand in full force and effect . . ." (R. 198).[3]

[3] Not sought or suggested by the parties or *amici curiae*, the court below *sua sponte* modified the judgment to state "that the trial court retains jurisdiction of the cause. . . ." Retention of jurisdiction by the trial court was ordered "so that it may modify its decree with changing facts and conditions . . ." (R. 193). The court below stated that, upon a showing that changed circumstances had eliminated the "emergency," appellants could apply to the Governor of Missouri to release the utility from seizure and apply to the trial court to modify the judgment if the Governor denied relief (R. 183-184, 185). Appellee contends that the judgment is therefore not final (motion to dismiss appeal, pp. 4-7). For the reasons stated at page 13, note 2 of the Jurisdictional Statement and in the brief in opposition to the motion to dismiss the appeal, express retention of jurisdiction to modify a permanent injunction upon a showing of changed circumstances simply articulates the inherent power of modification which exists even when unexpressed and of course does not detract from the finality of the judgment. Furthermore, even if it were accurate to describe the injunction as temporary, since the question at issue goes to the power of the court to enter it (see *In re Green*, 369 U.S. 689), the judgment is in any event final and reviewable as the definitive assertion of the court's power to deal with the subject matter. *Local No. 438 Construction & General Laborers' Union* v. *Curry*, 31 U.S. Law Week 4143 (S. Ct. Jan. 21, 1963). Lastly, finality exists for the further reason that there is nothing more to be decided. *Ibid.*

SUMMARY OF ARGUMENT

I

The question whether the King-Thompson Act conflicts with and is preempted by the Labor Management Relations Act, 1947, was before this Court in *Local No. 8-6, Oil, Chemical & Atomic Workers Union* v. *Missouri*, 361 U.S. 363. The Court in that case did not reach the merits of the question because it concluded that the controversy had been mooted. In dissenting from this disposition, Mr. Chief Justice Warren, Mr. Justice Black, and Mr. Justice Brennan stated that the "wrongfulness in holding the case moot is emphasized by our belief that the state court was plainly without any jurisdiction over this controversy unless this Court wants to overrule *Amalgamated Association S.E.R.M.C.E.* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, and adopt the views of the three dissenters in that case. We would follow that holding and reverse this case on the merits." 361 U.S. at 372.

Collective bargaining with the right to strike at its heart is the essence of the federal scheme. In contrast, section 295.200 of the King-Thompson Act makes "unlawful" "any strike or concerted refusal to work for any utility or for the state after any plant, equipment, or facility has been taken over by the state . . . , as a means of enforcing any demands against the utility or against the state." The section could not more bluntly identify its point of conflict with the National Act. It prohibits a strike as a means of enforcing demands. As the Court said of the Wisconsin Act in *Amalgamated Association*, so it may be said with precise parity of the King-Thompson Act, "It would be sufficient to state that the Wisconsin Act, in forbidding peaceful strikes for higher wages in indus-

tries covered by the Federal Act, has forbidden the exercise of rights protected by § 7 of the Federal Act." 340 U.S. at 398.

The validity of the King-Thompson Act is not saved by invoking the public character of a utility or calling the statute "strictly emergency legislation. . . ." *Infra*, p. 33. The identical plea was made but did not avail in *Amalgamated Association*. The transit company in Milwaukee is no less a utility than the transit company in Kansas City. A transit strike in Milwaukee is no less emergent than a transit strike in Kansas City. This Court in *Amalgamated Association* expressly ruled that the National Act does not allow "separate treatment for public utilities," pointing out that "Creation of a special classification for public utilities is for Congress, not for this Court." 340 U.S. at 391-393. And the explicit alternative ground of decision in *Amalgamated Association* rejected state intervention under the rubric of an "emergency." 340 U.S. at 394. There can hardly be a legal difference between a strike interrupting surface transportation in Milwaukee, as in *Amalgamated Association*, and a strike interrupting surface transportation in Kansas City, as in this case.

Nor is the King-Thompson Act saved by the parallel plea that it "is not a comprehensive code for the settlement of labor disputes in utilities as the Wisconsin Act appeared to be." *Infra*, p. 41. First of all, whether comprehensive or cursory, the state enactment falls if it conflicts with the National Act. In any event, the King-Thompson Act is not meaningfully less comprehensive than its Wisconsin counterpart. Its embracing character is marked by its very declaration of policy asserting that "the state's regulation of labor relations affecting such public utilities is necessary in

the public interest" (§ 295.010). Passing all other indicia, the King-Thompson Act establishes a special type of compulsory hearing, fact-finding and recommendation procedure applicable to labor disputes in public utilities. This procedure itself conflicts with the National Act. Thus, the essence of the federal scheme for mediation and conciliation is voluntarism—that the mediation and conciliation methods employed shall be acceptable to the parties and not forced on them. In contrast, the King-Thompson Act empowers the State Mediation Board to "take whatever steps it deems expedient to bring about a settlement of the dispute" (§ 295.080); the parties are to remain in "conference until excused by the board or its representatives" (*ibid.*); and a "public hearing panel" is ordained to which recourse is obligatory and which hears the dispute, finds the facts, and recommends settlement terms (§§ 295.120-295.180). As the Court of Appeals for the First Circuit stated in invalidating a Massachusetts statute similarly based on an activist method of dispute settlement, so here, the "obvious [state] statutory purpose is to coerce agreement by invoking official action to mold public opinion with respect to a labor dispute to the end of bringing the pressure of public opinion to bear to force a settlement. This is quite contrary to the national policy not to compel agreement but instead only to encourage voluntary agreements freely arrived at after 'good faith' bargaining between the parties. The conflict between the state and federal policy is obvious." *General Electric Co.* v. *Callahan*, 294 F. 2d 60, 67 (C.A. 1).

A "main" difference identified to save the validity of the King-Thompson Act is that "the Wisconsin Act provided for compulsory arbitration while the

King-Thompson Act does not." *Infra*, p. 48. But the absence of compulsory arbitration worsens the conflict with the National Act. Both statutes prohibit a utility strike and both therefore geld collective bargaining by depriving the union of the capacity to exert economic pressure to back its demands. The Wisconsin Act at least sought to rectify the imbalance it created by providing compulsory arbitration as a substitute for the strike. While this nullifies the freedom of the parties to work out the terms of their agreement for themselves, it does not subject the employees to the practical necessity of accepting the employer's terms for lack of means to induce him to yield more favorable conditions. And, as between terms impartially determined by a disinterested body and terms which an employer can unilaterally dictate because he can act without apprehension of a strike, the former more nearly harmonizes with the federal objective of "restoring equality of bargaining power between employers and employees" (LMRA, Title I, § 1, ¶4). And so, in prohibiting the strike without providing a compensating equivalent to substitute for it, the King-Thompson Act worsens the conflict with the National Act.

The reason overridingly stressed to support the validity of the King-Thompson Act is that the strike is prohibited only in conjunction with possession of the utility by the State. Utilization of seizure to signal prohibition of the strike does not save the statute. Congress canvassed and rejected seizure as an appropriate regulatory method.

This Court settled the question in *Youngstown Sheet & Tube Company* v. *Sawyer*, 343 U.S. 579, when it held that the President had no constitutional power to seize the steel mills to avert a national emergency, and

premised this conclusion in significant part on the fact that Congress in the Taft-Hartley Act had withheld seizure authority from the President even in national emergency strikes. Writing for the Court, Mr. Justice Black explained that (*id.* at 586):

> Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency. Apparently it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining. Consequently, the plan Congress adopted in that Act did not provide for seizure under any circumstances.

The power to seize which Congress withheld from the President to avert a national emergency it did not grant to a State Governor to avert a local emergency. No less than other short cuts to industrial peace, seizure "was rejected by Congress as being inconsistent with its policy in respect to enterprises covered by the federal Act, and not because of any desire to leave the states free to adopt it." *Amalgamated Association*, 340 U.S. at 395. As summarized by Senator Taft, the architect of the Labor Management Relations Act, 1947, upon whose views this Court strongly relied in *Amalgamated Association*, "We did not feel that we should put into law, as a part of the collective-bargaining machinery, an ultimate resort to compulsory arbitration, *or to seizure*, or to any other action. We feel

that it would interfere with the whole process of collective bargaining." 340 U.S. at 395, n. 21 (emphasis supplied).

Three times since this Court's decision in *Amalgamated Association* bills have been introduced, which Congress has by vote affirmatively refused to enact, designed to overrule that decision by amending the National Act to authorize state laws prohibiting or regulating strikes by public utility employees. Rejection by Congress took place in 1954, 1958, and 1959. Congress has thus ratified the rule of *Amalgamated Association* and again affirmed that public utility employees may not be subjected to state laws which deny or curtail the right to strike or to bargain collectively as guaranteed by federal law. Congress has left no room for the King-Thompson Act.

II

The King-Thompson Act offends substantive due process in violation of the Fourteenth Amendment of the United States Constitution. The vice stems from the statute's prohibition of a public utility strike without providing a compensating equivalent to substitute for the strike. The occasion for prohibition of the strike is seizure of the utility upon the Governor's determination that an actual or threatened strike jeopardizes the public interest, health and welfare. Barring superseding federal law or the independent operation of the Commerce Clause, one may grant a valid state interest in safeguarding the community from imminent jeopardy caused by interruption of utility services. But protection of that interest, if it can justify it at all (see *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522), can justify abolition of the strike

only if a compensating equivalent is substituted for the strike. It cannot justify relegation of the public utility worker to economic servility by depriving him of the right to strike and giving him nothing in place of it. As stated by Mr. Justice Brandeis, the legislature, "while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat." Dissenting in *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 448. But a fatal defect in what Missouri has done is that it has not substituted "processes of justice." It has forbidden the fight, and left the field to the employer. A statute is arbitrary and capricious, and therefore unconstitutional, when it sacrifices the interest of the employees in a fair wage and working conditions by depriving them, without any compensating equivalent, of their only effective weapon in the competition over the division of the joint product of capital and labor.

The same consideration shows the statute's imposition of involuntary servitude in violation of the Thirteenth Amendment of the United States Constitution. For to prohibit utility employees from striking, without substituting a compensating equivalent for the strike, brings about precisely the situation where "the master can compel and the laborer cannot escape the obligation to go on," with the result that "there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work." *Pollack* v. *Williams*, 322 U.S. 4, 17-18. In the industrial world of the twentieth century this is involuntary servitude. It is no answer to say that the statute does not prohibit the worker from quitting. He can quit only if there is other work he can find.

And the employee with substantial service with the employer can quit only if he is willing to surrender his equity in his seniority and start from scratch with another enterprise. The freedom to quit is therefore hollow. The hard fact is that employees who are prohibited from striking are compelled by economic exigency to stay on the job on the employer's terms. This is involuntary servitude in today's world.

III

Under date of December 28, 1962, the Governor of Missouri issued an Executive Order vacating the seizure of the property of the Company "effective at 11:59 P.M. o'clock, on Saturday, January, 12, 1963." Seizure was vacated although the underlying economic dispute remained unsettled, notwithstanding the provision of section 295.180 of the King-Thompson Act that seized property "shall be returned to the owners thereof as soon as practicable *after* the settlement of said labor dispute," and despite the absence of any change in the situation which originally persuaded the Governor to institute seizure. The lifting of seizure in these circumstances obviously does not moot the controversy. This case presents the third time that the property of the Company has been seized upon a threatened strike by the Union. The first seizure lasted eight months, the second four months, and the third fourteen months. The six other seizures of other utilities were of similarly limited duration. Injunctions predicated on seizure are therefore inherently short term in character. The validity of such short term injunctions, manifesting a continuing exertion of power as occasion for its exercises arises, remains subject to judicial review notwithstanding termination of the particular

order. Furthermore, vacation of seizure does not rest on renunciation of the right to invoke it. The labor dispute is still unsettled. A renewed strike over it simply augurs renewed seizure. And even if this dispute were settled, upon any future dispute seizure would again be invoked in the event of an actual or threatened strike by the Union. Remission of the wrong, to erupt again as soon as occasion requires, does not terminate the controversy. Public interest in determination of the validity of the King-Thompson Act joins the twin elements of a short-term order and likelihood of repetition in precluding a mootness conclusion. Finally, seizure was vacated almost at the moment of initial consideration of the appeal by this Court and nothing accounts for it but the appeal. If vacation of seizure on the eve of the appeal can undo it, the keys to the Court are in appellee's pocket. The requirement that a federal court adjudicate only a live controversy cannot be manipulated into a power in the offender to decide for himself when if ever he chooses to be brought to judgment.

ARGUMENT

I. THE KING-THOMPSON ACT IS IN CONFLICT WITH AND PREEMPTED BY THE LABOR MANAGEMENT RELATIONS ACT, 1947

There is of course no question but that the operations of the Company affect interstate commerce so as to bring its labor relations within the governance of the Labor Management Relations Act, 1947, and to subject it, its employees and the Union to the jurisdiction of the National Labor Relations Board. The Board asserts jurisdiction "over all public utilities which do a gross volume of business of at least $250,000 per annum or which have an outflow or inflow . . . across State

lines . . . of $50,000 or more per annum." *Sioux Valley Empire Electric Assn.*, 122 NLRB 92, 94. More particularly, the Board asserts "jurisdiction over all transit systems which do a gross volume of business of at least $250,000 per annum." *Charleston Transit Co.*, 123 NLRB 1296, 1297. See also, *HPO Service, Inc.*, 122 NLRB 394, 395. The Board pointed out that by adoption of the public utility standard it "endeavored reasonably to ensure that its jurisdiction will be exercised over all labor disputes involving local public utilities which exert or tend to exert a pronounced impact on commerce." *Sioux Valley Empire Electric Assn.*, 122 NLRB 92, 94. The Board announced this standard on October 2, 1958, and it was in effect on August 1, 1959. By Section 14(c)(1) of the National Labor Relations Act, newly enacted in 1959, Congress provided that "the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." There cannot be the least doubt, therefore, that a public utility like the Company is precisely the kind of enterprise that Congress brought and kept within the governance of the national labor laws through the exercise of its power to regulate interstate commerce.

It is equally clear that the King-Thompson Act is in conflict with and preempted by the Labor Management Relations Act, 1947. We shall show, first, that this has been authoritatively established by this Court in its decision in *Amalgamated Association S.E.R.M.C.E.* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, and second, that since the decision in *Amalgamated Association* Congress has been repeatedly asked and has consistently refused to change the law so as to allow

state prohibition or regulation of strikes and collective bargaining in local public utilities. In the course of this showing we shall independently demonstrate the incompatibility of the King-Thompson Act with the Labor Management Relations Act, 1947.

A. The Decision in Amalgamated Association Controls This Case

Amalgamated Association controls this case. In 1958 the Missouri Supreme Court sustained the validity of the King-Thompson Act against an attack on conflict and constitutional grounds. *Missouri* v. *Local No. 8-6, Oil Chemical & Atomic Workers Union*, 317 S.W. 2d 309. Its judgment was appealed to this Court. The Court did not reach the merits of the question because it concluded that the controversy had been mooted. In dissenting from this disposition, Mr. Chief Justice Warren, Mr. Justice Black, and Mr. Justice Brennan stated that the "wrongfulness in holding the case moot is emphasized by our belief that the state court was plainly without any jurisdiction over this controversy unless the Court wants to overrule *Amalgamated Association S.E.R.M.C.E.* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, and adopt the views of the three dissenters in that case. We would follow that holding and reverse this case on the merits." *Local No. 8-6, Oil, Chemical & Atomic Workers Union* v. *Missouri*, 361 U.S. 363, 372. In *Amalgamated Association* this Court invalidated the Wisconsin Public Utility Anti-Strike Law because it conflicted with the National Act. The Wisconsin Act made it "unlawful for any group of employees of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service"

(§ 111.62). The same conflict which invalidated the Wisconsin Act nullifies the Missouri Act.

1. Collective Bargaining With the Right to Strike At Its Heart Is the Essence of the National Act

Analysis begins with identifying the attributes of the National Act with which the state statute collides. Collective bargaining with the right to strike at its heart in the essence of the federal scheme. Section 7 of the National Act guarantees to employees the right "to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." "Congress safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike." *U.A.W.* v. *O'Brien*, 339 U.S. 454, 456-457.

More particularly, collective bargaining means free and private negotiation by which the employer and the union seek to reach agreement upon the terms which shall govern the wages, hours and working conditions to prevail at the enterprise. The content of the bargain is left to them. What an agreement should contain "is an issue for determination across the bargaining table" (*N.L.R.B.* v. *American National Ins. Co.*, 343 U.S. 395, 409); the government is not to "sit in judgment upon the substantive terms of collective bargaining agreements" (*id.* at 404). "The Act does not fix and does not authorize anyone to fix generally applicable standards of working conditions." *Terminal Railroad Ass'n* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6. "The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining; to encourage the employer and the representative of the

employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize strife. * * * The purposes of the Act are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves." *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283, 295.

But vis-a-vis the parties it is meaningless to say that the content of the bargain is for them to decide unless they have the power to bargain as equals. And to bargain as an equal a union must have a sanction it can invoke to make its voice heard. For this reason the right to strike to support economic demands is indispensable to collective bargaining. As the Court has stated, the "strike threat. . . . together with the 'occasional strike itself, is the force depended upon to facilitate arriving at satisfactory agreements.'" *N.L.R.B.* v. *Lion Oil Co.*, 352 U.S. 282, 291. And it later elaborated this basic premise upon which the National Act rests (*N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477, 488-489):

> It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary, and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and

> their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side. One writer recognizes this by describing economic force as "a prime motive power for agreements in free collective bargaining." Doubtless one factor influences the other; there may be less need to apply economic pressure if the areas of controversy have been defined through discussion; and at the same time, negotiation positions are apt to be weak or strong in accordance with the degree of economic power the parties possess.

In short, the parties are to determine the terms of their agreement for themselves, and the right to strike is essential to the process. The overhanging threat of a strike gives efficacy to negotiations by realization that if accord is not reached a strike may be the alternative. And as a two-edged sanction since it hurts both employees and the employer, both sides know that recourse to a strike can be injurious to each. Bargaining is therefore meaningful because the consequence of the failure to agree is unpleasant. Industrial peace is achieved because the right to resort to a strike without actual recourse to it ordinarily suffices to induce in the bargainers a frame of mind receptive to a reasonable

and responsible settlement. The occasional strike which does occur is part of the liberty to write their own agreement dear to both sides and essential to a free economy. This is the essence of the federal scheme. Prohibition of the strike upon seizure of the utility is inimical to it. As in this case, when the employer knows that the consequence of failure to agree is not a strike but its ban by seizure with employment terms left in *status quo* and the employer free to operate as he pleases, there is no incentive in the employer to contract on any terms but his own. There is no realistic freedom of the parties to write their own agreement, for the employer can stand fast and the union has no means by which to move him. In a word, nullification of the right to strike destroys not only the strike but collective bargaining which cannot exist without it. This is what the King-Thompson Act does. A state enactment which cuts so deeply into the federally protected scheme cannot survive.

2. The State Statute Collides With the National Act by Prohibiting a Strike as a Means of Enforcing Bargaining Demands

Section 295.200 of the King-Thompson Act makes "unlawful" "any strike or concerted refusal to work for any utility or for the state after any plant, equipment or facility has been taken over by the state . . ., as means of enforcing any demands against the utility or against the state." The section could not more bluntly identify its point of conflict with the National Act. It prohibits a strike as a means of enforcing demands. As the Court said of the Wisconsin Act in *Amalgamated Association*, so it may be said with precise parity of the King-Thompson Act, "It would be sufficient to state that the Wisconsin Act, in forbidding peaceful strikes for higher wages in industries covered

by the Federal Act, has forbidden the exercise of rights protected by § 7 of the Federal Act." 340 U.S. at 398. The Court later described *Amalgamated Association* as a case in which "the state court issued an injunction under a statute which made it a misdemeanor to interrupt by strike any essential public utility services. It was held that the state statute was invalid in that it denied a right which Congress had guaranteed under § 7 of the Taft-Hartley Act—the right to strike peacefully to enforce union demands for wages, hours and working conditions." *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 474-475. The King-Thompson Act is invalid for the identical reason. "'Congress occupied this field and closed it to state regulation.'" *Amalgamated Association*, 340 U.S. at 390. And the need for exclusive national regulation is especially emphasized by the fact that in this case the Company is an interstate enterprise straddling the border of two states and transporting passengers across state lines. *U.A.W.* v. *O'Brien*, 339 U.S. 454, 458.[4]

[4] Indeed, independently of implementing legislation by Congress, the King-Thompson Act as applied offends the Commerce Clause standing alone. The interstate transportation of passengers between Kansas and Missouri is a single, indivisible, interstate journey. The bus driver operating an interstate route cannot stop at the Missouri boundary and inform the passengers that he goes no further. Maintenance employees have no way of segregating their work so as to refuse to service buses operating in Kansas but not in Missouri. The "network of the system and the integration of the operation is such that it would be a physical impossibility to divide the two" (R. 76, see also, R. 75-76, 27-28). Prohibition of the strike in Missouri causes it therefore to cease in Kansas as well. The strike must be conducted on an interstate basis or not at all. There is no way by which it can be continued in Kansas if it is halted in Missouri. Accordingly, as with ferry transportation of freight and passengers across the Delaware River to and from Gloucester, New Jersey, and Philadelphia, Pennsylvania (*Gloucester Ferry Co.* v. *Pennsylvania*, 114 U.S. 196), and with trans-or-

3. The Public Character of a Utility Does Not Validate State Regulation of Utility Strikes

To support the prohibition of the strike which the King-Thompson Act works, the court below invokes the public character of a utility and its historic amenability to control, the importance of uninterrupted utility services to the community, and the utility's duty to render continuous service. *Missouri* v. *Local No. 8-6, Oil, Chemical & Atomic Workers Union*, 317 S.W. 2d 309, 317-319; R. 180-181. But this of course was the exact situation in *Amalgamated Association*. There can hardly be a legal difference between a strike interrupting surface transportation in Milwaukee, as in *Amalgamated Association*, and a strike interrupting

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tation across a bridge spanning the Ohio River and connecting the states of Ohio and Kentucky (*Covington & C. Bridge Co.* v. *Kentucky*, 154 U.S. 204), and with street car transportation of passengers across an interstate bridge between points in Covington, Kentucky, and Cincinnati, Ohio (*South Covington & Cin. Ry. Co.* v. *Covington*, 235 U.S. 537), so here, "it needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them is a subject of national character and requires uniformity of regulation." *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U.S. 196, 204. See also *Morgan* v. *Virginia*, 328 U.S. 373; *Southern Pac. Co.* v. *Arizona*, 325 U.S. 751; *Hanley* v. *Kansas City S. Ry. Co.*, 187 U.S. 617, 620; *Mo., K. & T. Ry. Co.* v. *Texas*, 245 U.S. 484.

The question of the independent operation of the Commerce Clause has not been presented on this appeal. In moving the court below to expedite the appeal before it, appellants offered to drop the Commerce Clause question to secure favorable consideration of the motion (R. 152-153). Upon grant of the motion (R. 157), in consideration of the basis for it, appellants did not brief the Commerce Clause question to the court below (Br. pp. 11-12). The court below nevertheless decided the question adversely to appellants on the merits (R. 175-176), and on that basis curiously concluded that appellants "may properly abandon" the question (R. 176). In view of the awkward procedural posture of the question, appellants decided that it was inappropriate to present it to this Court.

surface transportation in Kansas City, as in this case. An exception in favor of state regulation of utility strikes was not carved out in *Amalgamated Association* and it cannot be here.

Thus the majority opinion in *Amalgamated Association* noted that "the Wisconsin Supreme Court stressed the importance of utility service to the public welfare and the plenary power which a state is accustomed to exercise over such enterprises." 340 U.S. at 388. The dissent in *Amalgamated Association* invoked "the historic amenability to legal control of public callings. . . ." *Id.* at 405. But the view which prevailed is that "No distinction between public utilities and national manufacturing organizations has been drawn in the administration of the federal Act, and, when separate treatment for public utilities was urged upon Congress in 1947, the suggested differentiation was expressly rejected. Creation of a special classification for public utilities is for Congress, not for this Court."[5] *Id.* at 391-393.

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[5] Later cases emphasize the Court's commitment to the view that the utility character of the enterprise can make no difference. Kentucky sought to require drivers of common and contract carriers to cross against their will a picket line established at a plant where a strike was in progress to make deliveries to and accept shipments from the struck plant, invoking the duty of the carrier and its employees to render service. *General Drivers Local Union No. 89* v. *American Tobacco Co.*, 264 S.W. 2d 250. The Court reversed in a *per curiam* opinion, 348 U.S. 978, citing *Amalgamated Asso.* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, which stands for the proposition that the public character of a calling does not justify state alteration of the standard of conduct promulgated by the National Act, and *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, which stands for the proposition that a State cannot overcome the applicability of the National Act by a plea that the State is invoking a ground of intervention different from that on which federal supremacy has been exercised. See also,

4. The Validity of the King-Thompson Act Is Not Saved by Labelling It "Strictly Emergency Legislation"

The court below maintains that the "King-Thompson Act is strictly emergency legislation. . . ." R. 171, 182, 184-185; *Missouri* v. *Local No. 8-6, Oil, Chemical and Atomic Workers Union*, 317 S.W. 2d 309, 321. Ad-

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Teamsters Local Union No. 327 v. *Kerrigan Iron Works*, 353 U.S. 968; *McCrary* v. *Aladdin Radio Industries*, 355 U.S. 8. And see, *N.L.R.B.* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 750-751 (C.A. 9).

The court below states that, in accepting employment with a public utility, employees must be assumed to have done so in the light of the Public Service Commission law plus the King-Thompson Act and the subordinating impact these exert on their exercise of the right to strike, "and such law necessarily becomes a part of their contract of employment" (R. 180-181). It is pure fiction to say that a contract of employment existed incorporating the Public Service Commission law or the King-Thompson Act to which the employees assented. Fiction aside, a contract which derogates from the rights conferred by the National Act "obviously must yield or the Act would be reduced to a futility." *J.I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332, 337; see also, *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350, 364; *Local 1976, United Brotherhood of Carpenters* v. *N.L.R.B.*, 357 U.S. 93, 105. Well before the Wagner Act, section 2 of the Norris-LaGuardia Act (47 Stat. 70, 29 U.S.C., sec. 101, *et seq.*) had declared the "public policy of the United States" to include "full freedom" for the worker "to negotiate the terms and conditions of his employment" and to this end to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection;" section 3 of the Norris-LaGuardia Act then provided that "any . . . undertaking or promise in conflict with the public policy declared in section 2 of this Act . . . is hereby declared to be contrary to the public policy of the United States. . . ." Whether or not section 3 of the Norris-LaGuardia Act has general application or is limited to a court of the United States, there is no doubt that sections 7 and 8(a) of the National Act embody the same command as section 3 of the Norris-LaGuardia Act and create positive law binding on all. The notion of the court below that employees by working for a public utility accept inferior status is precisely the argument which Congress in 1947 rejected when it declined to heed Congressman Hoffman's plea that "they know they are in the public service when they go to work in an industry of that kind. . . ." 93 Cong. Rec. 3646.

vertence to "emergency" legislation simply restates in another form the basic plea that the importance of utility services justifies the State in establishing a different standard of labor relations to enterprises furnishing such services than the National Act prescribes. We shall show that (a) this Court in *Amalgamated Association* rejected just this argument and the view that it did not rest on a plain misreading of its opinion, and (b) there is no difference between the King-Thompson Act and the Wisconsin statute considered as "emergency" legislation.

(a) Appeal to the so-called emergency nature of the King-Thompson Act is based on the mistaken view that this Court left open this ground for exercising state authority in the utility field. Plainly it did not. In *Amalgamated Association* the validity of the Wisconsin Act was defended upon the following basis: In 1947 "Congress enacted special procedures to deal with strikes which might create national emergencies"; this shows a "congressional intent to carve out a separate field of 'emergency' labor disputes"; since "Congress acted only in respect to 'national emergencies,' . . . Congress intended, by silence, to leave the states free to regulate 'local emergency' disputes." 340 U.S. at 393-394. This Court rejected this argument on alternative grounds: first, the Wisconsin Act is not "emergency" legislation, and, second, it would make no difference even if it were. As to the first ground the Court stated that (340 U.S. at 393-394):

> However, the Wisconsin Act before us is not "emergency" legislation but a comprehensive code for the settlement of labor disputes between public-utility employers and employees. Far from being limited to "local emergencies," the act has been

> applied to disputes national in scope, and application of the act does not require the existence of an "emergency."

As to the second ground the Court stated that (340 U.S. at 394):

> In any event, congressional imposition of certain restrictions on petitioners' right to strike, far from supporting the Wisconsin Act, shows that Congress has closed to state regulation the field of peaceful strikes in industries affecting commerce. * * * And where, as here, the state seeks to deny entirely a federally guaranteed right which Congress itself restricted only to a limited extent in case of national emergencies, however serious, it is manifest that the state legislation is in conflict with the federal law.

Thus this Court plainly held that an "emergency" caused by a strike does not justify state regulation of it. That this was an alternative ground for decision does not in the least detract from its authoritativeness. It is old law that "where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537. On the contrary, "where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other.'" *United States* v. *Title Insurance & T. Co.*, 265 U.S. 472, 486. "In such a case the adjudication is effective for both." *Massachusetts* v. *United States*, 333 U.S. 611, 623. See also, *Union P.R. Co.* v. *Mason City & F. & D. R. Co.*, 199 U.S. 160, 166; *Richmond Screw Anchor Co.* v. *United States*, 275 U.S. 331, 340.

(b) Comparison of the King-Thompson Act with the Wisconsin Act shows clearly that both are based on the same philosophy and directed to the same end. Each embraces the premise that utility service is too important to permit its interruption and therefore utility strikes should be prohibited in order to maintain service. Thus section 111.50 of the Wisconsin Act declares that public utility labor disputes "are likely to cause interruption of the supply of an essential public utility service. The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and *creates an emergency* justifying action which adequately protects the general welfare" (emphasis supplied); section 295.010 of the King-Thompson Act indistinguishably states that "the possibility of labor strife in utilities . . . is a threat to the welfare and health of the people. . . ." *Infra*, p. 1a. Section 111.51 of the Wisconsin Act defines a "public utility employer" as any employer "engaged in the business of furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state . . .": section 295.020.1 of the King-Thompson Act defines the term "public utility" to include "any person engaged in the business of producing, distributing, selling, or otherwise furnishing electric light or power, heat, gas, steam, water, sewer service, transportation excepting railroads, communication, or any one or more of them to the people of Missouri." *Infra*, p. 1a. The Wisconsin Act describes a utility service as an "essential service" (sec. 111.51(2)); the King-Thompson Act defines utility services as "life essentials" (sec. 295.010, *infra*, p. 1a). The several steps of the Wisconsin Act are brought into play upon official determination that

the dispute "will cause or is likely to cause the interruption of an essential service" (secs. 111.54, 111.55); under the King-Thompson Act the Governor acts when he finds that "there is a threatened or actual interruption of the operation of such public utility as the result of a labor dispute" and the "public interest, health, and welfare are jeopardized" (sec. 295.180, *infra*, p. 8a). And as counterpart to the prohibition of the strike by the King-Thompson Act, the Wisconsin Act makes it "unlawful for any group of employees of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service" (sec. 111.62).

The two statutes cannot therefore be sensibly distinguished upon the basis that the King-Thompson Act more than the Wisconsin Act is distinctively devoted to sincere concern with the genuine hazards of interrupted utility service. Indeed, comparison of the instant case with the second of the companion cases in *Amalgamated Association* shows the untenable character of any such differentiation. In this case the judgment that "public interest, health and welfare" were jeopardized within the meaning of the King-Thompson Act rests primarily upon apprehension that a transit strike would substantially curtail retail sales in the downtown area of Kansas City, Missouri (R. 113, 84, 85-86, 87-91, 95, 108).[6] In the second of the

[6] Describing the strike as "sudden and total" (R. 172, 159), the court below appears to state that, had the strike been preceded by "reasonable notice and an opportunity to the public to adjust to such a situation," it would not "necessarily create such an emergency . . . as to justify permanent injunctive relief under the King-Thompson Act" (R. 185). This hedged inspiration was arrived at by the court below *sua sponte* and happens to be in com-

companion cases considered by this Court in *Amalgamated Association (United Gas, Coke & Chemical Workers v. Wisconsin Employment Relations Board*, No. 438, October Term, 1950, 340 U.S. 383, 386), the

plete conflict with the uncontroverted evidence. The Union gave more than three days' notice of the specific time the strike would begin, its president having on November 10 "handed the parties at the Federal Mediation and Conciliation office a so-called strike notice in which he pointed out that at midnight on November 13th all employees were instructed to cease work for the Kansas City Transit . . ." (R. 51). The Police Department had received "advance notice" of the strike and had prepared for increase in auto traffic by maximum assignment of traffic officers to duty (R. 116). The impending strike had been well publicized to the community (R. 29, 80, 94-95). "News that a large public utility strike and seizure are imminent in Missouri is a dramatic occasion. By newspaper, radio and TV the facts before and during seizure are extensively publicized. St. Louis and Kansas City newspapers and broadcasting stations give the public prompt and accurate news of strike and seizure developments." Missouri State Board of Mediation, Twelve Years Under the King-Thompson Act, 1947-1959, 23 (1959). Based on the "threatened strike" the seizure papers were prepared and seizure was effected before the commencement of the strike (R. 132-137, 37). There is thus no possibly tenable basis for the view of the court below that there was no sufficient advance notice of the strike. And, had this view been a genuine basis for decision, the court below presumably would have modified the injunction to permit resumption of the strike upon giving whatever prescribed notice the court below deemed adequate. If it had, it would make no difference. For, to require advance notice of the specific time of the strike call itself conflicts with the National Act. That Act makes no such provision. Its section 8(d) requires a sixty-day notice of proposed termination or modification prior to the expiration of an existing agreement, a thirty-day notice to the federal and state mediation agencies, and desistance from a strike or lock-out during such sixty-day notice period or the expiration of the agreement whichever is later. But there is no requirement that, after compliance with the terms of section 8(d), there must be a further notice in advance of the strike of the specific time it will begin.

As expressed in the testimony of the Chairman of the Missouri State Board of Mediation, in the actual administration of the

situation was far more serious. In the *United Gas* case a union and its officers were held in contempt for ignoring a state court restraining order which required them to call off a strike against the gas company. The strike began at 6:00 a.m., October 5, 1949. In its opinion, the Supreme Court of Wisconsin detailed the consequences (258 Wis. 1, 4, 44 N.W. 2d 547, 549):

> At 11:00 a.m. the public was advised to curtail consumption of gas and an appeal to consumers of gas was made to shut off the service; the steam pressure dropped to zero in the boiler room and no further pumping could be done with the main pumping facilities; the fires had to be pulled from the boilers reducing the steam pressure, and all facilities had to be stopped; a minimum pressure in the distribution system was kept in order that the air would not get into the mains so as to prevent any explosions due to the mixture of gas and air in the distribution system; the sendouts dropped to twenty-five per cent of what they had been previously. Low pressure in the system created *a dangerous condition fraught with the possibility of infinite injury to the public.* The public was advised by radio broadcasts and through

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King-Thompson Act requisite jeopardy within its meaning is deemed to exist whenever a strike causes total discontinuance of service by that utility (R. 57-58). Entering into the judgment that jeopardy exists are factors which are indigenous to any strike and are not distinctive attributes of a utility strike. Thus appellee adduced evidence that "a prolonged strike would certainly hurt the company very much by the loss of earnings" (R. 96); strikers during the course of a strike secure work elsewhere and may not return to work at the end of the strike causing the Company the expense and inconvenience of training replacements (R. 99); the strikers themselves "suffer materially" (R. 99); and there would be an interruption in the business of nonstruck firms causing their employees to be "without jobs and without earnings" (R. 115). It is thus the fact of a strike, and not simply the fact of a utility strike, that offends appellee.

> the newspapers to shut off appliances and to shut off the service at the meter. [Emphasis supplied.]

The restraining order was signed at 12:55 p.m., and served at 2:00 p.m. As the Wisconsin Supreme Court pointed out (258 Wis. at 5, 44 N.W. 2d at 549), the requirement of immediate compliance was embodied in the restraining order "[b]ecause of the seriousness of the situation already referred to resulting from the partial or complete stoppage of the essential service of furnishing gas to the public. . . ." And it predicated state authority to enforce the challenged restraining order squarely on the theory that state power to protect the public health, safety and welfare in "local emergencies" arising out of public utility strikes was not superseded by the National Act. 258 Wis. at 7-9, 44 N.W. 2d at 550-551.

This Court nevertheless reversed the contempt conviction. As it stated, "Having found that the Wisconsin Public Utility Anti-Strike Law conflicts with that federal legislation, the judgments enforcing the Wisconsin Act cannot stand." 340 U.S. at 399. The state court was "without power to hold one in contempt for violating an injunction that the state court had no power to enter by reason of federal pre-emption." *In re Green*, 369 U.S. 689, 692. Hence, in this case, to describe the King-Thompson Act as "emergency" legislation or to say that it treats with "emergency" situations provides no basis for sustaining its validity. A state acquires no power to act inconsistently with the standards prescribed by the federal statute because it acts "for reasons other than those having to do with labor relations. In *Amalgamated Association* . . ., the statute was directed at the preservation of public utility services and not at maintenance of sound labor rela-

tions, but the State's injunction was reversed." *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 480. See also, *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283, 295-296; *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244.

5. The King-Thompson Act Is Not Saved by the Plea That It Is Not a "Comprehensive Code" for Labor Disputes in Utilities: the Compulsory Hearing, Fact-Finding, and Recommendation Procedure It Prescribes Itself Conflicts With the National Act

The King-Thompson Act is not saved by the parallel plea that it "is not a comprehensive code for the settlement of labor disputes in utilities as the Wisconsin Act appeared to be." R. 171; *Missouri* v. *Local No. 8-6, Oil, Chemical and Atomic Workers Union*, 317 S.W. 2d 309, 321. First of all, whether comprehensive or cursory, the state enactment falls if it conflicts with the National Act. In any event, the King-Thompson Act is not meaningfully less comprehensive than its Wisconsin counterpart.

The King-Thompson Act in its very declaration of policy asserts that "the state's regulation of labor relations affecting such public utilities is necessary in the public interest" (§ 295.010, *infra*, p. 1a). It imposes requirements with respect to the duration, renewal, and change of collective bargaining agreements in public utilities. Thus, it requires that a collective bargaining agreement "shall be reduced to writing and continue for a period of not less than one year. . . . Such agreement shall be presumed to continue in force and effect from year to year . . . unless either or both parties thereto inform the other, in writing, of the specific changes desired to be made therein and shall also file a copy of such demands with the state board of mediation, at least sixty days before" the expiration of the

agreement or any yearly renewal of it (§§ 295.090, 295.100, *infra*, pp. 4a-5a). In contrast, the National Act requires a "written contract" only "if requested by either party" (§ 8(d)); it prescribes neither minimum duration nor automatic renewal; and it does not provide that a notice of termination or modification shall state the "specific changes" sought. The King-Thompson Act requires that, where *no* agreement exists and either the utility or the employees desire to effectuate a change in the terms of employment, "it shall be the duty of the party desiring such change, not less than sixty days prior to the effective date thereof, to inform the other party in writing of the specific changes so desired in the manner in which they are desired, either by written contract or otherwise and to file a copy of such terms with the state board of mediation" (§ 295.110, *infra*, p. 5a). In contrast, the National Act contains no such requirement. *Cf. N.L.R.B.* v. *Katz*, 369 U.S. 736; *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9. The King-Thompson Act provides penalties, including revocation of the utility's certificate of convenience and necessity, where the State Mediation Board has found "that any public utility has refused to bargain collectively in good faith with its employees over the terms and conditions of employment" (§ 295.200.5, *infra*, p. 10a). It requires that representatives "shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other" (§ 295.140, *infra*, p. 7a). And, most particularly, it establishes a special type of compulsory hearing, fact-finding, and recommendation procedure applicable to labor disputes in public utilities which itself conflicts with the National Act (§ 295.120, *infra*, p 6a).

Thus, in contrast to the state scheme of obligatory hearing and fact-finding plus recommendation of settlement terms, the essence of the federal scheme for mediation and conciliation is voluntarism—that the mediation and conciliation methods employed shall be acceptable to the parties and not forced on them. Section 202(a) of the National Act creates an independent agency known as the Federal Mediation and Conciliation Service and places it under the direction of a Federal Mediation and Conciliation Director. The Director "has no power except to act as a mediator and try to bring all parties to a dispute together. He cannot compel either party to any dispute to do anything." 93 Cong. Rec. 4591 (Senator Ball). The Mediation Service he directs "is purely voluntary." The Act creating it "does not give anyone any power." *Ibid.* Thus, section 203(c) of the National Act specifically provides, after defining the role of the Mediation Service, that "the failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act." Even in the field of national emergency strikes, when the President convenes a board of inquiry to look into the dispute and "to make a written report to him", section 206 of the National Act explicitly states that "Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position *but shall not contain any recommendations*" (emphasis supplied). Withholding the power to recommend is an affirmative part of the national labor policy prescribed by Congress. In the discharge of its function to study and investigate "the administration and operation of existing Federal laws relating to labor relations" (§ 402(7), National Act), the Joint Committee on

Labor-Management Relations reported that (Com. Print, Rep. No. 986, Part 3, 80th Cong., 2d Sess., 22 (1948)):[7]

> A further suggestion has been made that the emergency board be permitted to make recommendations as well as find the facts in these disputes. That alternative to the act's procedure was considered at length by the committees who drafted the act, and rejected by them as being in fact compulsory arbitration with public opinion providing the compulsion. The committee does not believe, in view of the success of the present procedure, that any case has been made for the adoption of that which was rejected by the committees who framed the law.

In short, as explained by William E. Simkin, present Director of the Federal Mediation and Conciliation Service, "It should be made clear at the outset that we do not and never have conceived of mediation as a decision-making process. Our sole reliance is on persuasion. We seek no powers other than the right and obligation to attempt to persuade. This concept obviously includes the right of any company or any union to decide against any particular suggestion that may be made."[8]

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[7] This report has often been relied upon by this and other courts as a valid expression of congressional purpose. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 75, n. 14; *N.L.R.B.* v. *Lion Oil Co.*, 352 U.S. 282, 288 and n. 5, and concurrence at 299-300; *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 9, n. 15, and dissent at 14 and n. 3, 15, n. 7; *American Newspaper Publishers Asso.* v. *N.L.R.B.*, 345 U.S. 100, 108, n. 8; *N.L.R.B.* v. *Wiltse*, 188 F. 2d 912, 921-924 (C.A. 6), cert denied, 342 U.S. 859; *Herzog* v. *Parsons*, 181 F. 2d 781, 788 (C.A.D.C.), cert. denied, 340 U.S. 810.

[8] Simkin, *Role of Government in Collective Bargaining*, 50 LRR 126, 129 (1962).

The King-Thompson Act proceeds on an opposite tack. Upon receipt of notice of a labor dispute, the State Mediation Board "shall require" the parties "to keep it advised as to the progress of negotiations"; "the board may fix a time and place for a conference between the parties to the dispute and the board or its representatives and shall take whatever steps it deems expedient to bring about a settlement of the dispute"; "It shall be the duty of all parties to a labor dispute to respond to the summons of the board for joint or several conferences with it or its representatives and to continue in such conference until excused by the board or its representative" (§ 295.080, *infra*, p. 4a). The State Mediation Board is given subpoena power (§ 295.070.2, *infra*, p. 3a). If no agreement is reached, the King-Thompson Act provides for a "public hearing panel" (§ 295.120.1, *infra*, p 6a); the panel is appointed and acts regardless of the wishes of the employer or the union or both not to designate members on it and not to participate in the hearing (§§ 295.120.2, 295.160, *infra*, pp. 6a, 7a-8a); the panel is to "hold and complete public hearings on the specific changes so requested, to the contract, agreement or understanding" (§ 295.120.2, *infra*, p. 6a); and "the panel shall file with the governor, in writing, a report setting forth a statement of the controversy, a resume of the evidence submitted to it and its recommendations based thereon" (§ 295.150, *infra*, p. 7a). "Should either the utility or its employees refuse to accept and abide by the recommendations made . . . and as a result thereof the effective operation of a public utility be threatened or interrupted," the Governor is empowered to seize the utility (§ 295.180.1, *infra*, p. 8a). Not inaptly the King-Thompson Act describes the process as "compulsory arbitration" (§ 295.170, *infra*, p. 8a).

In this case, instead of following the public hearing panel route prescribed by the King-Thompson Act, the Chairman of the State Mediation Board took the "position . . . that the State Board of Mediation as such had the same powers and jurisdiction as that of a panel which is provided for in the law . . ." (R. 70). "The members of the Board are in unanimous agreement that the powers vested in the Board . . . [to take whatever steps it deems expedient to bring about a settlement of the dispute], and as intended from the remaining provisions of the King-Thompson Act, justify the Board in its purpose to hear the issues in dispute and to exercise its mediation authority, including recommendations for settlement" (R. 146, 71). Accordingly, on October 31, 1961, the Governor of Missouri wired the Union urging it to "accept the services of the full membership of the State Board of Mediation forthwith to hear the most important issues and make recommendations for settlement" (R. 143, 70). On November 1, 1961, the Union wired its response, informing the Governor of its willingness to "accept the mediation efforts" of the state agency "provided that such efforts do not include hearings which result in recommendations" (*ibid.*). On November 6, 1961, the Chairman of the State Board notified the Company and the Union of his intention to assemble the full Board, and on November 8, 1961, the Board convened (R. 69, 52). Orally and in writing, at the meeting on November 8, the Union stated that, as ground rules for a successful proceeding, the State Board should act in a mediatory capacity only, "without any hearing of a public nature" and without "recommendations, public or otherwise" (R. 69-71, 52-54, 144-146). The Union "has always felt that negotiations cannot be properly conducted in the news-

papers or in the public" (R. 70). The State Board declined to commit itself to the method of proceeding requested by the Union, and the Union then withdrew from participation in the meeting of November 8 (R. 70-71, 52-54, 144-146). Thereafter, on November 11, 1961, the State Board issued a public written recommendation for settlement, proposing a wage increase only, all other unresolved issues to be dropped (R. 54-56).

The State Mediation Board thus acted in a manner incompatible with the standards of the National Act. To be sure, the National Act contemplates that the States may furnish mediation and conciliation service even though the dispute may otherwise be within the purview of the National Act (§§ 8(d)(3), 203(b)). But state participation in mediation and conciliation must be in keeping with federal standards. And the essence of the federal scheme is voluntarism. Persuasion is its motif. Helping the parties to help themselves by means palatable to them is the idea. The entire direction is to interfere as little as possible with the parties in working out their agreement for themselves. In contrast, the King-Thompson Act empowers the State Mediation Board to "take whatever steps it deems expedient to bring about a settlement of the dispute" (*supra*, p. 45); the parties are to remain in "conference until excused by the board or its representatives" (*supra*, p. 45); and compulsory hearing and fact-finding plus recommendation of settlement terms is decreed (*supra*, p. 45). In this case, arrogating to itself the role of a public hearing panel, the State Mediation Board proceeded to carry out the activist functions prescribed by the King-Thompson Act. And that statute in terms states, and

the State Mediation Board in fact applied, a method of dispute settlement in "conflict with the national policy of free and unfettered collective bargaining. . . ." *General Electric Co.* v. *Callahan*, 294 F. 2d 60, 67 (C.A. 1). What the Court of Appeals for the First Circuit stated in the latter case in invalidating a Massachusetts statute similarly based on an activist method of dispute settlement applies here (*ibid.*):

> The obvious [state] statutory purpose is to coerce agreement by invoking official action to mold public opinion with respect to a labor dispute to the end of bringing the pressure of public opinion to bear to force a settlement. This is quite contrary to the national policy not to compel agreement but instead only to encourage voluntary agreements freely arrived at after "good faith" bargaining between the parties. The conflict between the state and federal policy is obvious.

As expressed by the Joint Committee on Labor Management Relations, the method employed is "in fact compulsory arbitration with public opinion providing the compulsion" (*supra*, p. 44).

At all events, for the court below to say that the King-Thompson Act "is not a comprehensive code for the settlement of labor disputes in utilities" (*supra*, p. 41), and to attempt on that basis to distinguish the Wisconsin Act invalidated in *Amalgamated Association*, is to play games with the plain facts.

6. The Absence of Compulsory Arbitration in the King-Thompson Act Worsens Its Conflict With the National Act

A "main" difference identified by the court below to save the validity of the King-Thompson Act is that "the Wisconsin Act provided for compulsory arbitration while the King-Thompson Act does not." *Missouri* v.

Local No. 8-6, Oil, Chemical and Atomic Workers Union, 317 S.W. 2d 309, 321; R. 188. We pass the observation of the Joint Committee on Labor-Management Relations that recommendation of settlement terms is "in fact compulsory arbitration with public opinion providing the compulsion" (*supra*, p. 44). For the absence of compulsory arbitration worsens the conflict with the National Act. Both the Missouri and Wisconsin statutes prohibit a utility strike and both therefore cut to the heart of collective bargaining as federally envisaged. "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized"; "negotiation positions are apt to be weak or strong in accordance with the degree of economic power the parties possess." *N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477, 489. Prohibition of the strike thus gelds collective bargaining by depriving the union of the capacity to exert economic pressure to back its demands.

The Wisconsin statute at least sought to rectify the imbalance it created by providing compulsory arbitration as a substitute for the strike. While this nullifies the freedom of the parties to work out the terms of their agreement for themselves, it does not subject the employees to the practical necessity of accepting the employer's terms for lack of means to induce him to yield more favorable conditions. While neither result is compatible with agreement reached through negotiations which genuinely "reflect the strength and bargaining power" of the employees acting as a group (*J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332, 338), as between terms impartially determined by a disinterested body

and terms which an employer can unilaterally dictate because he can act without apprehension of a strike, the former more nearly harmonizes with the federal objective of "restoring equality of bargaining power between employers and employees" (Title. I, § 1, ¶4). There is no "equality of bargaining power" when there is no right to strike. And so, in prohibiting the strike without providing a compensating equivalent to substitute for it, the King-Thompson Act worsens the conflict with the National Act. It undoes the "whole effort . . . to restore equality between employer and employees in their dealings with each other . . ." (93 Cong. Rec. 5116, Senator Taft); it disrupts the "balance" sought by the National Act "where the parties can deal equally with each other and where they have approximately equal power" (93 Cong. Rec. 7537, Senator Taft).

7. Recourse to Seizure as the Particular Device to Signal Prohibition of the Strike Does Not Validate the King-Thompson Act

Not mentioned at all in its earlier opinion (*Missouri* v. *Local No. 8-6, Oil, Chemical and Atomic Workers Union*, 317 S.W. 2d 309), the reason now overridingly stressed by the court below to support the validity of the King-Thompson Act is that the strike is prohibited only in conjunction with possession of the utility by the State. R. 180-185. Utilization of seizure to signal prohibition of the strike does not save the statute. Congress canvassed and rejected seizure as an appropriate regulatory method.[9]

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[9] In addition to Missouri, seizure of the utility in the event of a strike is provided for by Massachusetts (Mass. Gen. Laws. Ann. ch. 150B, § 1-7 (1958)), New Jersey (N.J. Rev. Stat. §§ 34:13B-1 to -27 (Supp. 1961)), and Virginia (Va. Code Ann. §§ 56-509 to -528 (Repl. Vol. 1959)). North Dakota provides for seizure of "any coal mine or public utility" (N.D. Cent. Code §§ 37-0106 to

This Court settled the question in *Youngstown Sheet & Tube Company* v. *Sawyer*, 343 U.S. 579, when it held that the President had no constitutional power to seize the steel mills to avert a national emergency, and premised this conclusion in significant part on the fact that Congress in the Taft-Hartley Act had withheld seizure authority from the President even in national emergency strikes. Writing for the Court, Mr. Justice Black explained that *(id.* at 586):

> Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorize such governmental seizures in cases of emergency. Apparently it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining. Consequently, the plan Congress adopted in that Act did not provide for seizure under any circumstances. Instead, the plan sought to bring about settlements by use of the customary devices of mediation, conciliation,

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-0107 (1960)). Hawaii provides for seizure of "any stevedoring company" (Haw. Rev. L. ch. 92, §§ 92-1 to 92-11 (1955)). Kansas had provided for the seizure of enterprises engaged in (1) food and clothing manufacture, (2) mining or production of any substance used for fuel, (3) transportation of food, clothing, or fuel, and (4) public utilities and common carriers (Kan. Gen. Stat. Ann. § 44-620 (1949)), but the statute of which seizure was a part had been invalidated by this Court in *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522. State statutory proliferation to embrace seizure of coal mines, stevedoring companies, and clothing manufacturers emphasizes the force of Senator Taft's observation that "If we begin with public utilities, . . . I do not know where we could draw the line" (*infra*, p. 53).

> investigation by boards of inquiry, and public reports. In some instances temporary injunctions were authorized to provide cooling off periods. All this failing, unions were left free to strike after a secret vote by employees as to whether they wished to accept their employers' final settlement offer.

In agreement, Mr. Justice Frankfurter observed that "Congress in 1947 was again called upon to consider whether governmental seizure should be used to avoid serious industrial shutdowns. Congress decided against conferring such power generally and in advance, without special Congressional enactment to meet each particular need" (*id.* at 598). As Mr. Justice Burton stated, "Collective bargaining, rather than governmental seizure, was to be relied upon" *Id.* at 657; see also *id.* at 639, n. 8 (Mr. Justice Jackson), *id.* at 662-666 (Mr. Justice Clark).

The power to seize which Congress withheld from the President to avert a national emergency it did not grant to a State Governor to avert a local emergency. No less than other short cuts to industrial peace, seizure "was rejected by Congress as being inconsistent with its policy in respect to enterprises covered by the federal Act, and not because of any desire to leave the states free to adopt it." *Amalgamated Association*, 340 U.S. at 395. Even as to the rejected bills which "would have permitted the operation of state anti-strike legislation" (*id.* at 394, n. 20), a leading proponent explained that "Government seizure should not be resorted to in any event" (93 Cong. Rec. A 1007, Representative Case). The nub of the matter was laid bare by Senator Taft, the architect of the Labor Management Relations Act, 1947, upon whose views

this Court strongly relied in *Amalgamated Association* (340 U.S. at 395, n. 21):

> Basically, I believe that the Committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract. We recognize that right in spite of the inconvenience, *and in some cases perhaps danger*, to the people of the United States which may result from the exercise of such right. * * *
>
> *If we begin with public utilities, it will be said that coal and steel are just as important as public utilities.* I do not know where we could draw the line. So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours, and working conditions after proper opportunity for mediation.
>
> We did not feel that we should put into law, as a part of the collective-bargaining machinery, an ultimate resort to compulsory arbitration, *or to seizure*, or to any other action. We feel that it would interfere with the whole process of collective bargaining. [Emphasis supplied.]

The incompatibility of seizure with the National Act is especially apparent here. For seizure here is wholly token in character; involving nothing but paper possession of the utility, and having as its consequence and objective nothing but prohibition of the strike (*supra*,

pp. 11-12).[10] As the court below itself explained on a previous occasion when the very utility presently involved was taken over by the State pursuant to the King-Thompson Act (*Rider* v. *Julian*, 365 Mo. 313, 282 S.W. 2d 484, 494-495 (1955)):

> The possession which . . . [the Governor's agent] assumed was largely declaratory in nature. It was proclaimed by the governor and again by . . . [the agent] . . . , but actually nothing was done about it. * * *. The State's possession was not real or visible, nor was the transit company ousted from its "actual and continuous occupancy or exercise of full dominion" over its premises. * * *
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> It is apparent from the record, and we so hold, that possession of . . . [the Governor's agent] and the state was not intended to be and was not in fact actual possession. Insofar as the possession needs to be identified by name, it might be called a legal possession or a nominal and technical possession. It was more or less the assertion of the right to possession which did not, in this case, ripen into exclusive or actual possession.

In any event, whether nominal or real, seizure designed as an instrument for use in a labor dispute

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[10] In a remarkable insinuation the court below acknowledges the token character of the seizure "Assuming that the trial judge accepted and believed the testimony of the defendants' witnesses with reference to the State's operation of the utility . . ." (R. 174). There were not "witnesses" on this subject but only one witness and he was the Chairman of the Missouri State Board of Mediation designated by the Governor to act as his agent in taking possession of the utility (R. 137, 36-45, 62-65). We assume the court below does not mean to asperse his credibility. His testimony in this case is identical to his testimony in *Local No. 8-6, Oil Chemical & Atomic Workers Union* v. *Missouri*, 361 U.S. 363, October Term, 1959, No. 42, Record 261-270, 178-183. And the situation his testimony depicts is identical to that which the court below found to exist in *Rider* v. *Julian*, 365 Mo. 313, 282 S.W. 2d 484.

cannot be invoked compatibly with the National Act. When seizure is triggered by a strike, is aimed at stopping the strike, and has a duration limited by settlement of the labor dispute out of which the strike grows, the seizure to which the State resorts is a labor relations device in conflict with collective bargaining backed by the right to strike as guaranteed by federal law. This is forbidden to the State by the Supremacy Clause.

Seizure as a stop-gap measure in a labor dispute is of course wholly different from true governmental ownership and operation of a facility. A city is free to run its own subways or operate its own power plant just as the United States is free to run the Post Office or to build vessels in its own shipyards. When the Government is the permanent and exclusive owner and operator, the workers whom it employs are federal, state or city civil servants, and the labor relations of the governmental employer and the public employee are outside the scope of the National Act. This is the meaning of the statutory exclusion from the term "employer" as used in the National Act of "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof" (§ 2(2)), and from the term "employee" "any individual employed . . . by any . . . person who is not an employer as herein defined" (§ 2(3)). But these exclusions have no relevance when the governmental entity acquires the temporary role of an employer as a result of seizure triggered by a labor dispute and sheds that interim role upon vacation of seizure occurring no later than is practicable after settlement of the labor dispute. This is the meaning of *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343

U.S. 579. The executive order invalidated in that case as beyond the power of the President to promulgate had expressly provided that "The Secretary of Commerce shall determine and prescribe terms and conditions of employment under which the plants, facilities, and other properties possession of which is taken pursuant to this order shall be operated" (*id.* at 591). This may well have constituted the United States the employer of the steel workers for the period of seizure (*cf.*, *United States* v. *United Mine Workers*, 330 U.S. 258), and "the United States" is of course excluded by the National Act from the covered class of employers. But the statutory exclusion of the United States from the covered class of employers did not validate the seizure by which it had become the interim employer. Congress having withheld "provision for taking over property or running plants by the Government" (93 Cong. Rec. 4281, Senator Smith), respect for that decision required the conclusion that the seizure and the consequent assumption of the role of employer had been wrongful. A State is in no different position than the United States. The exclusion from the covered class of employers of "any State or political subdivision thereof" no more validates seizure by a State than does the parallel exclusion of "the United States" validate seizure by the United States. The crucial consideration is that Congress has decided against seizure. That decision cannot be undone by the indirection of a statutory exclusion applicable solely to true governmental ownership and operation.

The court below cannot therefore treat the case as if it put in issue the validity of forbidding a strike by governmental employees against the Government, nor

tax appellants for declining to be drawn into a fight on that artificial battleground. R. 180-182. Even if the State had in actuality assumed the role of the employer for the period of the seizure, the underlying fundamental question is the validity of the seizure pursuant to which this role was adopted. Arrogation does not settle the question of legality. But this case is even easier than that. For in this case the State did not in the least particular become the employer. The State's possession is altogether nominal. In no sense at all are the transit employees here the employees of "any State or political subdivision thereof." If they were, they would lose the protection of the National Act for the period of seizure, and this would mean that they would be vulnerable to discharge for union activity, the utility would not be obliged to bargain with their union, and any questions of representation involving them would not be determinable by the National Labor Relations Board. The result is unthinkable. There is no factual basis for it. The employees are obviously not public employees in any genuine sense.

The court below takes a related and equally untenable position. Relying upon the terms of the injunction prohibiting the strike "against the State of Missouri," and stating that appellants do not assert a right to strike against the State of Missouri, the court below seems to say that appellants have not taken issue with the single matter which the injunction prohibits (R. 177, 182, 185, 186). This is the sheerest casuistry. The strike which was enjoined could be denominated a strike "against the State" only in the sense that the State had taken nominal possession of the utility. The injunction against the strike was valid only if the seizure upon which it was predicated was valid. And

appellants at every stage forcefully and unmistakably contested the validity of the seizure and hence the validity of the injunction.[11] As the seizure and the injunction predicated on it are one and the same, an attack upon the seizure is indistinguishably an attack upon the injunction which takes its sole force and efficacy from the sizure. We did not play Hamlet without Hamlet.

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[11] Appellants' motion to dismiss explicitly stated that "Section 295.180 of said Law [the King-Thompson Act], providing that a public utility may be seized on the terms and conditions therein set forth is in conflict with the Labor-Management Relations Act, including but not limited to Section 7 and Section 13 thereof" (R. 9). Appellants' answer explicitly incorporated the grounds stated in the motion to dismiss (R. 132). At the trial, appellants adduced evidence showing the token character of the seizure (*supra*, pp. 11-12), as appears on the face of the opinion of the court below (R. 173-174), a showing compatible only with an attack upon the validity of the seizure. On appeal, the token character of the seizure was set out at length by appellants (Br. pp. 8-9), the "Points Relied On" explicitly stated that "Utilization of the seizure device to prohibit a public utility strike does not save the validity of the state enactment" (Br. p. 14), and this point was thereafter elaborated beyond mistake (Br. pp. 32-34), as appears on the face of the opinion of the court below (R. 189). Upon examination of the full record of the state proceeding, the three-judge federal district court, in staying the proceeding before it involving this controversy, recognized that the "permanent injunction was granted [by the Circuit Court of Jackson County] in a judgment *upholding the seizure and enjoining the strike*" (Jurisdictional Statement, p. 47a, emphasis supplied); it decided to abstain in deference to initial determination by the Missouri Supreme Court, recognizing that on the appeal pending before that court the validity of the seizure and injunction had been put in issue and would be adjudicated (Jurisdictional Statement, pp. 45a-54a). And appellee itself recognized that the state and federal actions presented "identical issues" (R. 61).

8. Invocation of the Police Power Does Not Support the King-Thompson Act

It need hardly be added that the King-Thompson Act cannot withstand an attack based on conflict with a federal statute by summoning in its support "the police powers of the state." *Missouri* v. *Local No. 8-6, Oil, Chemical and Atomic Workers Union*, 317 S.W. 2d 309, 316; R. 180, 189. A State cannot avoid the displacing impact of the Commerce Clause or federal legislation enacted pursuant to it "by simply invoking the convenient apologetics of the police power."[12] *Kansas City Ry. Co.* v. *Kaw Valley Drainage District*, 233 U.S. 75, 79. The meaning of the Supremacy Clause is that the exercise of paramount federal authority supersedes conflicting (*Hill* v. *Florida*, 325 U.S. 538) and indeed even complementary (*Campbell* v. *Hussey*,

[12] This is the short answer to the court below when it invokes the preamble to the National Act that industrial strife can be minimized or avoided if parties to labor disputes "above all recognize *under law* that neither party has any right in its relations with any other to engage in acts and practices which jeopardize the public health, safety or interest," from which it deduces that by "use of the term 'under law' state laws must have been intended as well as federal laws" because public health, safety, and interest are the traditional concern of the state police power. *Missouri* v. *Local No. 8-6, Oil, Chemical and Atomic Workers Union*, 317 S.W. 2d 309, 319; R. 182. All that we have said shows that "under law" means under the scheme of regulation Congress has created, which excludes state prohibition of utility strikes or interference with collective bargaining. It assumes the whole question, and disregards all the evidence, to say that "under law" must mean state law. Congress does not exclude state law out of disregard for "public health, safety, and interest"; on the contrary, Congress has determined that "public health, safety, and interest" are better served, evaluating it nationally rather than parochially, by free collective bargaining backed by the right to strike even in public utilities. Under the Supremacy Clause this judgment must prevail.

368 U.S. 297, 302) state regulation. "The legislation is not saved by calling it an exercise of the police power. . . ." *Charleston & W.C.R. Co.* v. *Varnville Furn. Co.*, 237 U.S. 597, 604

B. Congress Has Ratified the Rule of Amalgamated Association

Three times since this Court's decision in *Amalgamated Association* bills have been introduced, which Congress has by vote affirmatively refused to enact, designed to overrule that decision by amending the National Act to authorize state laws prohibiting or regulating strikes by public utility employees. Rejection by Congress took place in 1954, 1958 and 1959. Congress has thus ratified the rule of *Amalgamated Association* and again affirmed that public utility employees may not be subjected to state laws which deny or curtail the right to strike or to bargain collectively as guaranteed by federal law.

In 1954, Senator Smith of New Jersey introduced a bill of which section 16 proposed to add to section 14 of the National Act a new provision to read that (S. 2650, 83d Cong., 2d Sess., April 15, 1954):

> (c) Nothing in this Act shall be construed to interfere with the enactment and enforcement by the States of laws to deal in emergencies with labor disputes which, if permitted to occur or continue, will constitute a clear and present danger to the health or safety of the people of the State: Provided, that no State shall be authorized by this subsection to take action in any labor dispute in which the Federal Government is acting pursuant to Sections 206 to 210, inclusive, of the Labor Management Relations Act, 1947, as amended.

This bill was in keeping with the recommendations of President Eisenhower in his message to Congress

that year (100 Cong. Rec. 129; H.R. Doc. No. 291, 83d Cong., 2d Sess., Jan. 11, 1954):

> The act should make clear that the several States and Territories, when confronted with emergencies endangering the health or safety of their citizens, are not, through any conflict with the Federal law, actual or implied, deprived of the right to deal with such emergencies. The need for clarification of jurisdiction between the Federal and the State and Territorial Governments in the labor-management field has lately been emphasized by the broad implications of the most recent decision of the Supreme Court dealing with this subject. The Department and Agency Heads concerned are, at my request, presently examining the various areas in which conflicts of jurisdiction occur. When such examination is completed, I shall make my recommendations to the Congress for corrective legislation.

President Eisenhower further developed this view in a letter to Senator Smith (S. Rep. No. 1211, 83d Cong., 2d Sess., 8):

> My associates are still studying this extremely complex problem, and while that study has not as yet been completed, it has gone far enough to develop some conclusions:
>
> (1) Where the governor of a State determines that a labor dispute is endangering, or will endanger, the health and safety of the citizens of that State, certainly nothing in the Federal law should have the effect of preventing the State from dealing with that dispute. This was covered specifically in my message of January 11.
>
> (2) Nothing in the Federal law should have the effect of preventing a state from exercising its traditional police powers for maintaining public order.

In reporting the Smith bill favorably, the Senate Labor Committee stressed that the amendments proposed fulfilled the President's recommendations. S. Rep. No. 1211, 83d Cong., 2d Sess., 2, 8. The Committee observed that the bill "authorizes the States and Territories to protect the health and safety of their citizens in labor disputes where genuine emergencies exist even though the enterprises involved are otherwise subject to the exclusive jurisdiction of the National Labor Relations Board. . . ." *Id.* at 3. And amplifying its basis for supporting the amendment, the Committee stated that (*id.* at 17):

> As the committee reads the most recent of these decisions (*Garner et al. v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (AFL)* (346 U.S. 485, 74 S.Ct. 161, Dec. 14, 1953)), the States, in labor matters involving interstate commerce, are substantially limited to their traditional police powers to control violence and coercion, or to safeguard public order and safety and the use of streets and highways. Emergencies arising from labor disputes which threaten the health or safety of the people of the State but which are not accompanied by violence, coercion, obstruction of streets and highways, etc. are not lawfully subject to regulation by the States if the enterprise involved is one in or affecting interstate commerce as broadly defined by the courts.
>
> Nor can the Federal Government act in connection with such local or statewide emergencies. The national emergency provision of the Taft-Hartley Act are applicable only to emergencies imperiling the national health or safety. As a consequence, no agency of Government has power to act in interstate situations where immediate action is essential to prevent disaster or widespread injury and damage but the emergency is not national in scope. The committee therefore approved an amendment

empowering the States and Territories to fill this gap even where interstate commerce is involved. Where intrastate commerce alone is involved the powers of the States remain undiminished.

The bill was debated at length on the Senate floor. In advocating its passage, Senator Smith observed that investiture of the States with power to deal with labor disputes thought to create an emergency was "one of the most controversial subjects in the bill" (100 Cong. Rec. 5836). He expressly agreed with Senator Holland, who in a series of questions pinned down the applicability of the proposed amendment to public utility strikes, that the States would be empowered to act in transit strikes where the affected transit company was substantially the only means of transportation available to large elements of the public. 100 Cong. Rec. 5838.

Despite administration support the Senate failed to pass the Smith bill. Rather, on May 7, 1954, it was recommitted by a vote of 50 to 42. 100 Cong. Rec. 6202.

In 1958 Senator Holland introduced a bill designed to overrule the decision in *Amalgamated Association* by amending the National Act to provide that (S. 3692, 85th Cong., 2d Sess.):

> Nothing in this act or in the Labor Management Relations Act, 1947, shall be construed to nullify the provisions of any State or Territorial law which regulates or qualify the right of employees of a public utility to strike or which prohibit strikes by such employees.
>
> As used in this subsection the term "public utility" means an employer engaged in the business of furnishing water, light, heat, gas, electric power,

> sanitation, passenger transportation, or communication services to the public. . . .[13]

The measure was identical to bills which had been introduced by Senator Holland in 1951 (S. 1535, 82d Cong., 1st Sess., May 23, 1951) and 1955 (S. 527, 84th Cong., 1st Sess., June 18, 1955). On neither previous occasion were the bills reported out of committee. In 1958, at a hearing held by a subcommittee of the Senate Labor Committee, Senator Holland testified in favor of his bill and the International President of the Amalgamated Association (the parent organization of appellant Union) submitted a statement in opposition to it. *Hearings Before The Subcommittee on Labor of the Senate Labor Committee*, 85th Cong., 2d Sess., 465-493, 1444-48. The bill was not reported out of committee but Senator Holland introduced the measure on the floor of the Senate. He plainly disclosed the purpose of his proposed amendment in these terms (104 Cong. Rec. 11090):

> We offer the amendments in the earnest hope that finally Congress will act to fill this particular legal "void"—or labor-management "no man's land"—which fails to assure the continued operation of local public utilities, which dangerous situation was created on February 26, 1951, by a strained interpretation, by the United State Supreme Court, in the so-called Wisconsin case, construing the legislative intent in the passage of the Taft-Hartley Act.

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[13] As reported to committee, the bill also covered an employer "operating a gas pipeline or a toll bridge or tunnel" but this additional coverage was deleted from the bill when brought to the Senate floor by Senator Holland. 104 Cong. Rec. 11090.

The proposed amendment was debated (104 Cong. Rec. 11090-11101) and voted upon and defeated 60 to 27 (*id.* at 11101).

Finally, in 1959, Congress enacted the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519, 29 U.S.C. § 401). On April 25, 1959, during the debate on the bill which became that Act, Senator Holland introduced the same amendment that he had introduced in 1958, 1955, and 1951. Again he made it plain that his purpose was to secure legislation that would overrule the decision in *Amalgamated Association* (105 Cong. Rec. 6733-6740). He observed that "Under the Court's decision in the Wisconsin case, the States . . . are left without any power at all . . . to keep their public utilities running" (*id.* at 6733); he decried an 83-day bus strike in Jacksonville, Florida, and a bus strike in Miami, Florida (*id.* at 6735); and in further support of his plea for permitting the States to regulate strikes in local public utilities he stated (*id.* at 6735):

> I remind the Senate that the public utilities which serve in these fields are given licenses or franchises by the states in which they serve; that they are regulated by the states in which they serve; that they are given their licenses and franchises in order to serve the public; that they are required to serve the public; that no lockout or shutdown should be permitted.

When the suggestion was made that the matter be submitted to committee for further hearings Senator Holland did not withdraw the amendment but said (*id.* at 6740):

> I hope . . . that the Senate will take the matter out of the hands of the Committee now by taking

favorable action on this very simple amendment to restore to the States the power to handle under their own laws, these relatively few vital industries.

As in 1958, the proposed amendment was again voted on and again defeated, this time by a vote of 64 to 27. 105 Cong. Rec. 6740.

Not only did Congress refuse to enact legislation authorizing state prohibition or regulation of public utility strikes, but in 1959 it affirmatively expressed its purpose to keep the labor relations of public utilities within the domain of federal law. It amended section 14 of the National Act to provide that:

> (c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.
>
> (2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

This amendment accomplishes a two-fold purpose: (1) it allows state regulation of labor disputes over which

the National Labor Relations Board has declined to exercise the jurisdiction it possesses, and (2) it prohibits declination of jurisdiction by the Board in any case in which it would assert jurisdiction under the standards it had established as of August 1, 1959. H. Conf. Rep. No. 1147, 86th Cong., 1st Sess., 36-37. Under these standards the Board asserts jurisdiction "over all public utilities which do a gross volume of business of at least $250,000 per annum or which have an outflow or inflow . . . across State lines . . . of $50,000 or more per annum" (*Sioux Valley Empire Electric Assn.*, 122 NLRB 92, 94); more particularly, the Board asserts "jurisdiction over all transit systems which do a gross volume of business of at least $250,000 per annum" (*Charleston Transit Co.*, 123 NLRB 1296, 1297); and by the public utility standard it adopted the Board "endeavored reasonably to assure that its jurisdiction will be exercised over all labor disputes involving local public utilities which exert or tend to exert a pronounced impact on commerce" (*Sioux Valley Electric Assn.*, 122 NLRB 92, 94). Thus Congress enacted the public utility standard into permanent law to establish the irreducible level at which the Board must act and no State may intrude.

The upshot is clear. Congress has ratified the rule of *Amalgamated Association*.[11] It continues to refuse, as it had in 1947, to create a special classification for local public utility employees. It has again affirmed that such employees, no less than other employees engaged in operations that affect interstate commerce, may not be subjected to state laws which deny or curtail the

[11] *Gullett Gin Co.* v. *N.L.R.B.*, 340 U.S. 361, 365-366; *Queensboro Farm Products* v. *Wickard*, 137 F. 2d 969, 977 (C.A. 2).

rights guaranteed them by federal law. It has maintained in being for all employees the forthright policy expressed by Senator Taft in his concluding speech preceding the congressional overriding of the presidential veto of the Taft-Hartley Act: "... [The bill] is based on the theory that the solution of the labor problem in the United States is free, collective bargaining. ... [W]e believe that the right to strike for hours, wages, and working conditions in the ultimate analysis is essential to the maintenance of freedom in the United States. ... [O]ur freedom depends upon maintaining the free right to strike." 93 Cong. Rec. 7536-37. Congress has left no room for the King-Thompson Act.

II. THE KING-THOMPSON ACT ABRIDGES FEDERAL RIGHTS CONFERRED BY THE FOURTEENTH AND THIRTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A. Prohibition of a Utility Strike, Without Substituting a Compensating Equivalent for It, Offends Due Process

It is no doubt true, and we do not contest, that "neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike." *Dorchy* v. *Kansas*, 272 U.S. 306, 311. It is equally true, and we think it is incontestable, that while the right to strike is not absolute, neither is the power to prohibit it absolute. Whether the particular prohibition transgresses the guarantee of due process is to be tested by the conventional standard "that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia* v. *New York*, 291 U.S. 502, 525.[15]

[15] How little it advances the solution of the problem to state that the right to strike is not absolute is evident from the circumstances appearing in the cases in which the statement is made.

The premise from which analysis begins has been aptly stated (Cox, Cases on Labor Law, 812 (3d ed. 1954)):

> On principle it would seem that the interest of employees in freedom to strike is cognizable under the Fifth and Fourteenth Amendment. Recourse to a strike involves the withholding of personal service and the association of individuals into a group. Withholding personal service is surely an exercise of "liberty" in the constitutional sense; and although the point is not clear on the decisions, the concept seems broad enough to include freedom of association.[16] The fact that the strike is a weapon—a form of self-help—used to advance the workers' interest in wages, hours and other terms and conditions of employment does not militate against the claim to some degree of constitutional protection. A constitution which assures the owner of property an opportunity to obtain a reasonable return on his capital surely must recognize the worker's interest in the conditions under which he labors and the price he receives for his work. And, as Mr. Chief Justice Taft observed years ago, modern industrial organization makes the worker's opportunity to improve his wages and conditions of employment dependent upon associa-

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Thus, in *Dorchy* v. *Kansas*, 272 U.S. 306, the state statute was held not unconstitutional as applied because the strike was for the impermissible purpose of collecting a stale claim due a fellow member of the union who was formerly employed in the business. In *U.A.W.* v. *W.E.R.B.*, 336 U.S. 245, the prohibited activity consisted of unannounced "quickie" work stoppages for unstated ends, and the authority of that case has been sharply dissipated if not altogether dispelled. *N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477, 493, n. 23.

[16] If there ever had been, there is now no doubt that due process protects freedom of association. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 460-467.

tion and collective bargaining backed by freedom to strike.

> "A single employee was helpless in dealing with an employer. He was dependent upon his daily wage for the maintenance of himself and his family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. Each united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with him." [*American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209.]

The indispensability of the right to strike to preservation and enhancement of the employee's working welfare is underscored by the fact that without the backing of the strike collective bargaining is a nullity. Collective bargaining is a combination of pressure and persuasion, but the capacity to persuade draws its power from the economic strength which can be mustered to support the argument. As this Court has stated, the "strike threat . . ., together with 'the occasional strike itself, is the force depended upon to facilitate arriving at satisfactory agreements.'" *N.L.R.B.* v. *Lion Oil Co.*, 352 U.S. 282, 291.

Accordingly, in this case, when Missouri prohibits public utility employees from striking, it cripples their ability through collective bargaining to induce their employer to grant satisfactory terms. Collective bargaining without the right to strike is just talk. The employer is free to dictate his own terms because his employees have no means by which to induce him to yield to theirs. The State has deprived them of their

power by "withholding their labor of economic value to make him pay what they thought it was worth." *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209.

This is a deep incursion into economic liberty. It is no answer to say, as the court below does, that the "only limitation upon an employees' strike or a company's lockout is if the public interest is endangered," so that the "King-Thompson Act does not abolish the right of utility employees to strike, but only subordinates the right to the public interest." *Missouri* v. *Local No. 8-6, Oil, Chemical & Atomic Workers Union*, 317 S.W. 2d 309, 321, 323. Barring superseding federal law or the independent operation of the Commerce Clause (*supra*, p. 30, n. 4), one may grant a valid state interest in safeguarding the community from imminent jeopardy caused by interruption of utility services. But protection of that interest, if it can justify it at all (see *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522), can justify abolition of the strike only if a compensating equivalent is substituted for the strike. Whatever reasonable alternatives to a strike which a legislature may choose, the alternative which is not available is destruction of the employees' interest. For it is precisely that which renders the King-Thompson Act "unreasonable, arbitrary. . . . capricious. . . ." *Nebbia* v. *New York*, 291 U.S. 502, 525.

Of course the Constitution does not permit the judiciary to choose from among rational alternatives that one which it thinks is best-suited. But it does require, when the legislature selects an irrational means, that such means shall be stricken down. Any state interest in uninterrupted utility service can be fully satisfied by substituting a rational alternative for the strike.

But to abolish the strike, and substitute nothing in its place, relegates the public utility worker to economic servility in his relations to his employer. No state interest exists which justifies this subservience.

And so, as Mr. Justice Brandeis observed, the legislature, "while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat." Dissenting in *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 488, cited with approval, *U.A.W.* v. *W.E.R.B.*, 336 U.S. 245, 252, 259; *Thornhill* v. *Alabama*, 310 U.S. 88, 104. But a fatal defect in what Missouri has done is that it has not substituted "processes of justice." It has forbidden the fight and left the field to the employer. A statute is arbitrary and capricious, and therefore unconstitutional, when it jettisons the interest of the employees in a fair wage and working conditions by depriving them, without any compensating equivalent, of their only effective weapon in the competition over the division of the joint product of capital and labor.

It wholly elides the issue to say, as the court below does, that appellants simply "are enjoined from striking *against the State during state operation of the utility*" (R. 191, italics in original), so that the "right to strike is not in question in this case as 'the right to strike' is generally understood, to wit, against a private employer" (R. 190). The State operates nothing; state possession is fictive; seizure is a crude camouflage which prohibits the strike but does nothing else. In the frank words of the Chairman of the Missouri State Board of Mediation, "employees may not strike to close down a public utility" (R. 60). No repetitive incantation of the State's paper possession can conceal or palliate the stark issue posed by this fiat.

B. Prohibition of a Utility Strike, Without Substituting a Compensating Equivalent for It, Results in Involuntary Servitude

The Thirteenth Amendment prohibits "involuntary servitude." The prohibition is of course not confined to the abolition of slavery but has a broader purpose. It is designed "to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude." *Bailey* v. *Alabama*, 219 U.S. 219, 241. Its "undoubted aim" is "to maintain a system of completely free and voluntary labor throughout the United States." And "in general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work." *Pollock* v. *Williams*, 322 U.S. 4, 17-18.

In this case, to prohibit utility employees from striking, without substituting a compensating equivalent for the strike, brings about precisely the situation where "the master can compel and the laborer cannot escape the obligation to go on," with the result that "there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work." In the industrial world of the twentieth century this is involuntary servitude. To be sure, section 295.210 of the King-Thompson Act states that the worker can quit, and so that court below can verbally aver that the statute "is directed against a strike or concerted refusal to work and has nothing to do with one or more quitting work of their own volition." *Missouri* v. *Local No. 8-6, Oil, Chemical & Atomic*

Workers Union, 317 S.W. 2d 309, 325. But this involution blinks economic reality. The worker can quit only if there is other work he can find. A few may find other employment, but for the mass of the employees there is no realistic alternative to remaining on the job. And this is especially true of the worker with substantial service with the particular employer. Increasing length of service means greater benefits based on seniority. To illustrate by the expired agreement between the Company and the Union in this case (def. ex. 5): seniority governs the order of layoff and recall (Art. I, § 11, p. 12); wages increase with length of service (Art. IV, § 1, p. 30); pensions and disability allowances depend on continuous unbroken service (Art. 1, § 16, Sched. 1, pp. 17, 43); seniority determines the length of vacations (Art. I, § 15, p. 15); priority in bidding jobs and picking choice runs is based on seniority (Art. II, §§ 19, 20, Art. III, §§ 3, 9, pp. 29, 30, 33, 35); and tool allowances and extra work are determined by seniority (Art. VII, §§ 4, 6, pp. 34, 35). An employee with substantial service is therefore free to quit but only if he is willing to surrender his equity in his seniority and start from scratch with another enterprise.

And so the freedom to quit is hollow. The hard fact is that employees who are prohibited from striking are compelled by economic exigency to stay on the job on the employer's terms. This is involuntary servitude in today's world.[17]

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[17] The statements of the court below (R. 190-192) that appellants' claims based on the Thirteenth and Fourteenth Amendments were not presented to the trial court are wholly without merit for the reasons stated in full at note 10, page 29, of the Jurisdictional Statement to which the Court is respectfully referred.

III. THE CASE IS NOT MOOT

On January 8, 1963, appellee transmitted to the Court a certified copy of an Executive Order issued by the Governor of Missouri under date of December 28, 1962, vacating the seizure of the property of the Company "effective at 11:59 P.M. o'clock, on Saturday, January 12, 1963." Appellee stated that the injunction ceases to have operative effect upon the vacation of seizure.[18] It also stated that it had informed the Court of the forthcoming vacation of seizure because that action has a "material bearing" upon the appeal pending before the Court. Appellee did not otherwise explain its position. On January 10, 1963 appellants wrote to the Clerk of the Court resisting the suggestion of mootness implicit in appellee's statement. On January 14, 1963 the Court noted probable jurisdiction rather than postpone consideration of the question of jurisdiction to the hearing of the case on the merits. Anticipating that appellee will pursue its suggestion of mootness, we treat with the question.

1. This case presents the third time that, as a result of seizure of the property of the Company upon a threatened stoppage by the Union, state power has been interposed to prevent the employees from striking to enforce their economic demands. The first seizure

[18] Appellee nevertheless contemporaneously applied to the Circuit Court of Jackson County, Missouri, for an order dissolving the injunction and dismissing the petition. Appellants suggested to that court that it was without power to dissolve the injunction and dismiss the cause during the pendency of the appeal to this Court (*Newton* v. *Consolidated Gas Co.*, 258 U.S. 165, 177; *In re Allen*, 115 F. 2d 930, 936 (C.A.); *cf. United States* v. *Frank B. Killian Co.*, 269 F. 2d 491, 494 (C.A. 6); 7 Moore's Federal Practice ¶ 73.12 (2d ed.)), and that court has not acted on the request to dissolve and dismiss.

lasted from April 1950 to December 11, 1950, a period of eight months (R. 73); the second seizure lasted from November 6, 1957 to March 6, 1958, a period of four months (R. 73); the third and instant seizure lasted from November 13, 1961 to January 12, 1963, a period of fourteen months, the longest in the history of the King-Thompson Act. The six other seizures of other public utilities have been of similarly limited duration, lasting from a minimum of eleven days to a maximum of forty-three weeks (R. 195). Injunctions predicated on seizure are therefore inherently short term in character. Were the termination of seizure to preclude inquiry into the legality of the injunction based on it, the power to seize would be forever immunized against final judicial determination of its validity. This Court has closed the door to the possibility. The validity of short term orders, manifesting a continuing exertion of power as occasion for its exercise arises, remains subject to judicial review notwithstanding termination of the particular order. "The questions involved in the orders . . . are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review. . . ." *Southern P. Terminal Co.* v. *I.C.C.*, 219 U.S. 498, 515.[19]

[19] See also, *Southern Pacific Co.* v. *I.C.C.*, 219 U.S. 433, 452; *McGrain* v. *Daugherty*, 273 U.S. 135, 180-182 (A proceeding to test the power of a congressional investigating committee is not mooted by the expiration of the particular Congress that created the committee where the investigation has not been completed and the committee may be revived by motion at any time); *Leonard* v. *Earle*, 279 U.S. 392, 398 (Mandamus action to compel the issuance of a license granted only on an annual basis is not moot where plaintiff intends to continue in business).

The decisions in the Courts of Appeals are particularly instructive. *Technical Radio Laboratory* v. *F.C.C.*, 36 F. 2d 111, 113

2. The Executive Order vacating the seizure recites that "the labor dispute between" the Company and the Union "remains unresolved. . . ." This is the first time in the history of the King-Thompson Act that seizure has been lifted although the underlying economic controversy is still unsettled. The action was taken notwithstanding the provision of section 295.180 of the King-Thompson Act that the seized "utility, plant, equipment or facility shall be returned to the owners thereof as soon as practicable *after* the settle-

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(C.A.D.C.) (Appeal from denial of an application to renew a three-month station license heard and decided after the period for which the license might have been issued had expired, the court noting that to moot the controversy because the particular license period had expired "would practically nullify the right of appeal" by reason of the shortness of time and that at issue was not only the particular license but a "continuing right to apply . . . for successive renewals . . ."); *Yarnell* v. *Hillsborough Packing Co.*, 70 F. 2d 435, 438 (C.A. 5) (Action not mooted by revocation of particular prorate orders on eve of hearing without admitting the illegality of the orders or disclaiming an intention to reinstate the orders or make others of similar import); *Gay Union Corp.* v. *Wallace*, 112 F. 2d 192, 195 (C.A.D.C.), cert. denied, 310 U.S. 647 (Appeal from denial of an application to participate in allotment of sugar made on an annual basis decided after expiration of the yearly period, since similar denial "seems not unlikely" to occur in succeeding years and, "in the very nature of things, it will be again impossible to secure a court review and obtain a decision before the end of the allotment period"); *Dyer* v. *S.E.C.*, 266 F. 2d 33, 46-47 (C.A. 8) (Review of SEC order approving proxy statement heard and decided after the annual meeting had been held for which statement was prepared, where the underlying fight is continuing and it is "impossible practicably" to obtain judicial review before the annual meeting is held); *Application of Colton*, 291 F. 2d 487, 492 (C.A. 2) (Contest on appeal over the power to seek certain information by subpoena not mooted by abandoning the particular subpoena which had been contested and issuing another subpoena); *Pan American World Airways, Inc.* v. *C.A.B.*, 300 F. 2d 904, 905 (C.A.D.C.) (Review of "seasonal exemptions" not mooted by expiration "as the problem is a recurring one").

ment of said labor dispute . . ." (emphasis supplied).[20] And seizure was vacated despite the absence of any change in the situation which originally persuaded the Governor to institute it.

Vacation of seizure where nothing has changed gives no assurance that a resumed strike would not after a few days be again illegalized by a fresh institution of seizure.[21] At this writing the labor dispute is still unsettled. To call a strike now would recreate the exact situation which prevailed on November 13, 1961, when

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[20] "The Missouri law provides that the seizure shall be terminated when the dispute is settled." Missouri State Board of Mediation, Twelve Years Under the King-Thompson Act, 1947-1959, 20 (1959). Nevertheless, the court below opined that seizure could be vacated without awaiting the settlement of the labor dispute (R. 183, 184), erroneously stating that the "Act as construed by officials of this State in administering it show that the Governor may release the control of a utility's physical property at any time after seizure. (See Appendix A and Appendix B set out at the close of this opinion.)" (R. 183). There had been no such construction and nothing in either appendix remotely suggests that seizure had ever before been vacated short of settlement. Constitutional questions aside, a state court is of course free to mangle the interpretation of its own state statute as it pleases.

It may be added that Appendices A and B are *ex parte* representations made by the Chairman of the Missouri State Mediation Board which appellee appended to its brief in the court below. Appendix A errs in stating that in 1956 and 1957 a strike was "started" by the Union against the Company (R. 195). A strike was threatened, and as a result seizure was invoked, but no actual strike occurred on either previous occasion (R. 73-74, 87, 93). There may be other errors in the appendices of which we are unaware.

[21] According to a newspaper account, when asked whether he would "seize the utility again" if the Union "strikes after the company is returned," the Governor of Missouri replied, "We'll cross that bridge when we get to it, if that does occur. . . ." Kansas City *Star*, Dec. 28, 1962.

the Union first struck. Nothing has altered. No single differentiating feature exists. The requisite jeojardy by state standards to "public interest, health and welfare" then thought to obtain would be no less manifest now. Unless sheer caprice rules the administration of the King-Thompson Act, a renewed strike simply augurs renewed seizure.

It would make no difference even if the present labor dispute were settled. For upon any future dispute between the Company and the Union seizure would again be invoked in the event of an actual or threatened strike. The presently vacated seizure is the third of a series of identical acts in a continuing course of conduct. Its lifting does not result from any renunciation of the underlying claim to the right and power to impose it. The power to seize remains fully available to serve again, with full intention to resort to it again. Each act of seizure is but a particular manifestation of a continuing course of conduct, to be forthwith resumed upon every succeeding threatened or actual strike by the Union against the Company.

Remission of the wrong, to erupt again as soon as occasion requires, does not terminate the controversy. "[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the cause, *i.e.*, does not make the case moot. . . . A controversy may remain to be settled in such circumstances, . . . *e.g.*, a dispute over the legality of the challenged practices. . . . The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632. "To disarm the court it must appear that there is no reason-

able expectation that the wrong will be repeated." *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 448 (C.A. 2).

3. This case thus combines the twin elements of a short term order and likelihood of repetition each of which independently precludes a conclusion that the controversy has been mooted. Otherwise offenders "could take advantage of the other party and prevent an appellate court from ever deciding upon the legality of their conduct by limiting the effective period of their orders or discontinuing their conduct at the crucial time." *Meyers* v. *Jay Street Connecting Railroad*, 288 F. 2d 356, 360 (C.A. 2). These reasons are joined in this case by "a public interest in having the legality of the practices settled. . . ." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632.[22] For while "public interest" in the resolution of a controversy will not of itself suffice to keep a case alive if the controversy is otherwise definitely ended, "public interest" is a strong influence where other factors also serve to show the continuity of the controversy.[23]

The public interest is especially manifest in this case. The King-Thompson Act was passed in 1947. During the sixteen years since its enactment seizure has been invoked nine times to bar employees of public utilities from striking to enforce their demands in collective bargaining (R. 195). Throughout this time all negotiations involving public utility employees have been conducted by their unions under the disability of the pervasive threat of seizure precluding recourse to

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[22] See also, *McGrain* v. *Daugherty*, 273 U.S. 135, 182; *Dyer* v. *S.E.C.*, 266 F. 2d 33, 47 (C.A. 8).

[23] Diamond, *Federal Jurisdiction To Decide Moot Cases*, 94 U. Pa. L. Rev. 125, 138 (1946).

a strike. And, throughout this time, to say the least, grave doubt as to the validity of this actual or apprehended exertion of state power has existed. It is indispensable that all concerned with the enforcement of the King-Thompson Act—the public utility employees, the employers for whom they work, the unions which represent them, and the public—finally know whether their affairs are being ordered in accordance with a valid enactment.

Notwithstanding dominating public interest in determination of the controversy, appellee is bent upon eluding a test of the validity of the power it wields. Seizure was vacated almost at the very moment of initial consideration of the appeal by this Court. Nothing but the appeal seems to account for it.[24] If such precipitate action can undo the appeal there remains no way by which to test the validity of the King-Thompson Act consistent with compliance with the injunction while it is in force. Despite maximum diligence in managing the litigation recourse to the Court through normal channels is closed.[25] Yet it is

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[24] See *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632, n. 5.

[25] From the filing of the petition for injunction in the trial court on November 15, 1961, through affirmance of the judgment by the court below on October 8, 1962, a total of 46 weeks elapsed. Of this 46 weeks, fully 26 weeks, or more than half of the total time, was consumed in waiting for judicial decision after counsel had fully concluded their presentation. Thus, at the end of the first day of trial on November 27, 1961, the trial judge stated that he intended "to rule on this quite expeditiously" (R. 65). His expeditious ruling was rendered on February 12, 1962 (R. 128), eleven weeks later and more than seven weeks after the last document was filed with the court on December 22, 1961 (R. 127). In the court below, notwithstanding appellants' efforts to secure an expedited appeal (R. 150-157), from the time of the submission of the last document to it dated May 28, 1962 (R. 201) to rendition of decision on October 8, 1962, nineteen weeks elapsed.

beyond peradventure clear that appellee does "intend to enforce this state statute until its unconstitutionality has been finally adjudicated." *Evers* v. *Dwyer*, 358 U.S. 202, 204. Vacation of seizure is not an act of contrition, a confession of error, but a device to frustrate adjudication. The public interest in a determination of the controversy is joined by the public interest in scotching manipulation to prevent it.

4. Neither *Harris* v. *Battle*, 348 U.S. 803, nor *Local No. 8-6, Oil, Chemical & Atomic Workers Union* v. *Missouri*, 361 U.S. 363, is apposite. Unlike either of those cases, in this case at this writing the underlying economic dispute still remains unsettled. In *Harris*, before the prayer for permanent relief against seizure even came before the *nisi prius* state court for hearing, the labor dispute had been settled, the strike had been called off, and the seizure had been lifted.[26] In *Local No. 8-6*, less than a month elapsed between seizure and settlement (361 U.S. at 365-366), and the decree of the Circuit Court from which appeal was taken to Missouri Supreme Court had not been finalized until *after* settlement.[27] In this case the appeal came to this Court

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[26] The strike began on December 10, 1952; an agreement was reached on January 12, 1953; seizure was vacated on February 5, 1953; the bill for a permanent injunction or declaratory judgment was heard on May 12, 1953 by the Circuit Court of City of Richmond, Virginia; that court denied injunctive relief and declared the state action valid on June 12, 1953; the Supreme Court of Appeals of Virginia on January 27, 1954, declined to hear the merits of the appeal, "the court being of opinion that there no longer exists a justiciable issue to be determined by this court. . . ." Statement of appellees opposing jurisdiction and motion to dismiss, 4-5, Statement as to jurisdiction, 6-10, 14, *Harris* v. *Battle*, 348 U.S. 803, October Term, 1954, No. 111.

[27] Record, 294-295, 311-312, October Term, 1959, No. 42.

with the economic dispute still unsettled and the controversy as fully alive as the day it started.

Furthermore, independently of the continuing currency of the underlying dispute, *Harris* and *Local No. 8-6* are amply distinguishable even if the dispute were settled. On the particular records in those cases it could be thought that judicial intercession need not anticipate a future recurrence of the wrong but could await its actuality. This basis for judgment is not entertainable in this case. It is now clear that, if vacation of seizure in the course of litigation can of itself moot the case, there is no way a person aggrieved by application of the King-Thompson Act can reach this Court to test its validity by appeal from a permanent injunction. Until this case it was possible to believe that an aggrieved person could secure eventual vindication of his federal rights if he had the fortitude to endure the wrong until the litigation had run its course. But even that hard road would now be closed. For appellee can at any time stop the aggrieved person in his tracks by the simple expedient of vacating seizure despite the absence of settlement and in that uncontrollable way bring the action to a standstill. No case could survive unless appellee chose that it should survive. The key to the Court would be in appellee's pocket. It goes without saying that the requirement that a federal court adjudicate only a live case cannot be manipulated into a power in an offender to decide for himself when if ever he chooses to be brought to judgment.

The reality of this case is the antithesis of mootness. Vacation of seizure means only that appellee chooses to run a little bit today in order to be sure that he will not be prevented from fighting another day. The par-

ties remain in the toils of a live dispute in which their positions are sharply adverse and the need for decision exigent.

CONCLUSION

For the reasons stated, the judgment should be reversed and the cause remanded with instructions to dismiss the petition for injunction as beyond the power of the state court to entertain.

Respectfully submitted,

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APPENDIX A

THE KING-THOMPSON ACT

Chapter 295, RSMo 1949

Public Utility Labor Disputes Mediation and Seizure

295.010. *Labor relations affecting public utilities—state policy.*—It is hereby declared to be the policy of the state that heat, light, power, sanitation, transportation, communication, and water are life essentials of the people; that the possibility of labor strife in utilities operating under governmental franchise or permit or under governmental ownership and control is a threat to the welfare and health of the people; that utilities so operating are clothed with public interest, and the state's regulation of the labor relations affecting such public utilities is necessary in the public interest. (L. 1947 V. I p. 358 § 1)

295.020. *Definitions.*—1. The term "*public utility*" shall include any person engaged in the business of producing, distributing, selling or otherwise furnishing electric light or power, heat, gas, steam, water, sewer service, transportation excepting railroads, communication, or any one or more of them to the people of Missouri.

2. The term "*person*" means any individual, firm, copartnership, corporation, municipal corporation, company, association, or joint-stock association; and includes any trustee, receiver, assignee, or personal representative thereof.

3. The term "*representative*" means any person or persons, labor union, organization, or corporation designated either by a utility or group of utilities or by its or their employees to act or do for them.

4. The term "*collective bargaining*" shall be understood to embody the philosophy of bargaining by employees through representatives of their own choosing, and shall

include the right of representatives of employees' units to be consulted and to bargain upon the exceptional as well as the routine wages, hours, rules, and working conditions.

5. The term "*labor dispute*" shall involve any controversy between employer and employees as to hours, wages, and working conditions. The fact that employees have amicable relations with their employers shall not preclude the existence of a dispute among them concerning their representative for collective bargaining purposes.

6. The term "*employee*" shall refer to anyone in the service of another, actually engaged in or connected with the operation of any public utility throughout the state.

7. The term "*board*" shall mean the state board of mediation. (L. 1947 V. I p. 358 § 2)

295.030. *Governor to appoint state board of mediation—members—qualifications—terms—vacancy.*—1. Within thirty days after the effective date of this chapter the governor, by and with the advice and consent of the senate, shall appoint five competent persons to serve as a state board of mediation; two of whom shall be employers of labor, or selected from some association representing employers of labor, and two of whom shall be employees holding membership in some bona fide trade or labor union; the fifth shall be some person who is neither an employee nor an employer of labor and who shall be chairman of said state board of mediation.

2. Two members of said board shall be appointed for one year, two for two years, and one for three years, and all appointments thereafter shall be for three years or until their respective successors are appointed in the manner herein provided.

3. If a vacancy occurs in said board by death or otherwise, at any time, the governor shall appoint some compe-

tent person having the same qualifications as his predecessor to fill the unexpired term. (L. 1947 V. I p. 358 § 3)

295.040. *Oath of members—main office—meetings.*—Each member of said board shall, before entering upon the duties of his office, take and subscribe an oath to support the Constitution of the United States and this state and to demean himself faithfully in his office. The main office of the state board of mediation shall be in Jefferson City, but the board may hold meetings at any time or any place in the state whenever the same shall become necessary, and three members of the board shall constitute a quorum for the transaction of business. (L. 1947 V. I p. 358 § 4)

295.050. *Duties of chairman.*—The chairman of the board shall devote his full time to his duties and shall have charge of the office of the board. He shall keep all records of the proceedings of the board, and shall supervise the work of the employees of the board, and shall have such other powers and duties as may be conferred, or imposed upon him by the board. (L. 1947 V. I p. 358 § 5)

295.060. *Compensation and expenses of board members.*—The chairman of the board shall receive a salary of five thousand dollars per annum, payable monthly; each of the other members of the state board of mediation shall receive fifteen dollars per day for the time spent in the performance of their duties. All members shall receive traveling and other expenses incurred in the performance of their duties. (L. 1947 V. I p. 358 § 6)

295.070. *Powers and duties of board.*—1. The state board of mediation shall have power to employ and fix the compensation of conciliators and other assistants and to delegate to such assistants such powers as may be necessary to carry out its duties under this chapter. The board shall by regulation prescribe the methods of procedure before it.

2. The board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the pro-

duction of evidence which relates to any matter under investigation by the board. In cases of refusal to obey a subpoena issued by the board the circuit court of Cole county or of any county where the person refusing to obey such subpoena may be found, on application by the board, shall have power to issue an order requiring such person to appear before the board and to testify and produce evidence ordered touching the matter under investigation, and any failure to obey such order shall be punished by the court as a contempt thereof. (L. 1947 V. I p. 358 § 7)

295.080. *Labor disputes—action by board.*—1. Upon receipt of notice of any labor dispute between parties subject to this chapter, the board shall require such parties to keep it advised as to the progress of negotiations therein.

2. Upon application of either party to a labor dispute or upon its own motion the board may fix a time and place for a conference between the parties to the dispute and the board or its representative, upon the issues involved in the labor dispute and shall take whatever steps it deems expedient to bring about a settlement of the dispute including assisting in negotiating and drafting a settlement agreement.

3. It shall be the duty of all parties to a labor dispute to respond to the summons of the board for joint or several conferences with it or with its representatives and to continue in such conference until excused by the board or its representative. (L. 1947 V. I p. 358 § 8)

295.090. *Labor agreements—renewal.*—All collective bargaining labor agreements hereafter entered into between the management of a utility and its employees or any craft or class of employees shall be reduced to writing and continue for a period of not less than one year from the date of the expiration of the previous agreement entered into between the management of the utility and its employees or if there has been no such previous agreement then for a period of not less than one year from the date of the actual

execution of the agreement. Such agreement shall be presumed to continue in force and effect from year to year after the date fixed for its original termination unless either or both parties thereto inform the other, in writing, of the specific changes desired to be made therein and shall also file a copy of such demands with the state board of mediation, at least sixty days before the original termination date or sixty days before the end of any yearly renewal period, or sixty days before any termination date desired thereafter. (L. 1947 V. I p. 358 § 10)

Sec. 295.100. *Changes in Labor Agreement—Notice.*—1. In the case of all existing labor contracts, agreements or understandings which do not provide for at least a sixty-day notice of desired changes and which contracts, agreements or understandings terminate after seventy days following the effective date of this chapter, the parties thereto shall nevertheless inform, in writing, the other party or parties of any specific changes desired to be made in said contract, agreement or understanding and file a copy of such desired changes with the state board of mediation at least sixty days before the date fixed for the termination of said contract, agreement or understanding.

2. In the case of labor contracts, agreements or understandings terminating within seventy days after this chapter shall become effective, the parties thereto shall forthwith, or not later than ten days after the effective date of this chapter, inform the other party, in writing, of the specific changes desired to be made in said contract, agreement or understanding and promptly file a copy of such demands with the state board of mediation.

Sec. 295.110. *Changes in Employment Terms in Absence of Labor Contract.*—Whenever, after the effective date of this chapter, a situation exists in any utility whereby employees are rendering services under terms and conditions which were not at the time this chapter becomes effective and which have not heretofore been the subject of the con-

tract, and said employees desire to effectuate a change in the terms of employment or a utility desires to effectuate a change in said terms of employment, then and in that event, it shall be the duty of the party desiring such change, not less than sixty days prior to the desired effective date thereof, to inform the other party in writing of the specific changes so desired in the manner in which they are desired, either by written contract or otherwise and to file a copy of such terms with the state board of mediation.

295.120. *Public hearing panel—members—powers—hearings.*—1. In the event that management of a utility and the representatives for collective bargaining purposes of any craft or group of employees of such utility shall not have reached and executed a final agreement in writing as to all conditions of employment affecting such employees on or before the termination date of any existing contract, agreement or understanding, or any renewal thereof, or unless the parties shall have, before said date, agreed to submit any and all disputes between them to arbitration, the management of such utility and the representatives of such employees shall, within five days after such termination date, each designate, in writing, a person as a public hearing panel member and file such designation with the state board of mediation; the two persons so designated shall choose a third disinterested and impartial person and these three shall compose and act as a panel.

2. The panel shall promptly proceed and within fifteen days following their designation hold and complete public hearings on the specific changes so requested, to the contract, agreement or understanding. Such period of fifteen days may be extended by mutual written consent of the parties. The panel shall give to each party full notice and opportunity to be heard, but the failure of either party to appear before the panel at the time and place fixed by it shall not deprive the panel of jurisdiction to proceed to a hearing and to make report thereon as herein provided. (L. 1947 V. I p. 358 § 14)

295.130. *Appearance in person or by counsel—notice of hearing.*—Parties may be heard either in person or by counsel as they may elect, and the panel shall give due notice of all hearings to the employee or employees or their representatives and the public utility or utilities involved in the labor dispute. (L. 1947 V. I p. 358 § 15)

295.140. *Selection of party representatives.*—Representatives for the purposes of this chapter shall be designated by the respective parties without interference, influence or coercion by either party over the designation of representatives by the other. Representatives of employees for the purpose of this chapter need not be persons in the employ of the utility. (L. 1947 V. I p. 358 § 16)

295.150. *Report of hearing to governor.*—Within five days after closing such hearings the panel shall file with the governor, in writing, a report setting forth a statement of the controversy, a resume of the evidence submitted to it and its recommendations based thereon. (L. 1947 V. I p. 358 § 17)

295.160. *Appointment of representatives by board when not designated by parties.*—1. In the event either management of the utility involved or the representatives of the employees for collective bargaining purposes shall fail or neglect to designate, as herein provided, such a person to represent it upon the panel or the two so designated shall fail to agree upon the third member of the panel, within ten days after the date fixed for the termination of such contract, agreement or understanding or upon failure to file such designations or any of them with the state board of mediation within said ten-day period, the state board of mediation shall appoint such person or persons, selecting in each case a person qualified by previous experience or employment to represent employers, employees or the public as the case may require.

2. Should both management and the representatives of the employees fail or neglect to designate representatives

upon said panel within the time herein required, then the state board of mediation shall appoint a panel of three persons, to be selected as follows: one to represent management of the utility, giving the management forty-eight hours to select its preference from a list of five persons submitted by the board to the management before designating such person; one to represent the employees involved, giving their representative forty-eight hours to select their preference from a list of five persons submitted by the board to such representative, before designating such person; and one to act as the impartial third person. Failure on the part of either party to make such selection shall not prevent the board from appointing the members of the panel from the lists submitted. (L. 1947 V. I p. 358 § 18)

295.170. *Proceedings Not to Supersede Voluntary Arbitration.*—Compulsory arbitration, as provided in this chapter shall not be effective in disputes where voluntary arbitration is a part of the contract between the disputing parties. In the event that through the voluntary arbitration disputing parties cannot agree, the state board of mediation shall then enforce the compulsory arbitration as provided.

295.180. *Utility strike—power of governor.*—1. Should either the utility or its employees refuse to accept and abide by the recommendations made pursuant to the provisions of this chapter and as a result thereof the effective operation of a public utility be threatened or interrupted, or should either party in a labor dispute between a utility and its employees, after having given sixty days' notice thereof, or failing to give such notice, engage in any strike, work stoppage or lockout which, in the opinion of the governor, will result in the failure to continue the operation of the public utility, and threatens the public interest, health and welfare, or in the event that neither side has given notice to the other of an intention to seek a change in working conditions, and there occurs a lockout, strike or work stop-

page which, in the opinion of the governor, threatens to impair the operation of the utility so as to interfere with the public interest, health and welfare, then and in that case he is authorized to take immediate possession of the plant, equipment or facility for the use and operation by the state of Missouri in the public interest.

2. Such power and authority may be exercised by the governor through such department or agency of the goverment as he may designate and may be exercised after his investigation and proclamation that there is a threatened or actual interruption of the operation of such public utility as the result of a labor dispute, a threatened or actual strike, a lockout or other labor disturbance, and that the public interest, health and welfare are jeopardized, and that the exercise of such authority is necessary to insure the operation of such public utility; provided, that whenever such public utility, its plant, equipment or facility has been or is hereafter so taken by reason of a strike, lockout, threatened strike, threatened lockout, work stoppage or slowdown, or other cause, such utility, plant, equipment or facility shall be returned to the owners thereof as soon as practicable after the settlment of said labor dispute, and it shall thereupon be the duty of such utility to continue the operation of the plant facility, or equipment in accordance with its franchise and certificate of public convenience and necessity. (L. 1947 V. I p. 358 § 19)

295.190. *Governor to prescribe rules and regulations.*— The governor is authorized to prescribe the necessary rules and regulations to carry out the provisions of this chapter. (L. 1947 V. I p. 358 § 20)

295.200. *Unlawful acts—penalties—enforcement of provision.*—1. It shall be unlawful for any person, employee, or representative as defined in this chapter to call, incite, support or participate in any strike or concerted refusal to work for any utility or for the state after any plant, equipment or facility has been taken over by the state under

this chapter, as means of enforcing any demands against the utility or against the state.

2. It shall be unlawful for any public utility to employ any person or employee who has violated paragraph 1 of this section except that such person or employee may be employed only as a new employee.

3. Any labor organization or labor union which violates paragraph 1 of this section shall forfeit and pay to the state of Missouri for the use of the public school fund of the state, the sum of ten thousand dollars for each day any work stoppage resulting from any strike which it has called, incited, or supported, continues, to be recovered by civil action in the name of the state and against the labor organization or labor union in its commonly used name.

4. Any officer of any labor organization or labor union representing employees of public utilities who participates in calling, inciting or supporting any strike in violation of paragraph 1 of this section shall forfeit and pay to the state of Missouri, for the use of the public school fund of the state, the sum of one thousand dollars to be recovered by civil action in the name of the state and against such officer.

5. Any public utility that engages in a lockout which brings about a work stoppage shall forfeit and pay to the state of Missouri, for the use of the public school fund of the state, the sum of ten thousand dollars for each day of work stoppage caused by such lockout, said amount to be recovered by civil action in the name of the state and against the public utility, provided further, that if upon any investigation, supported by competent evidence by the state board of mediation, it shall appear that any public utility has refused to bargain collectively in good faith with its employees over the terms and conditions of employment, said state board of mediation shall certify such

record and proceedings to the public service commission, and, upon consideration of the facts in such record and proceedings the public service commission shall find that the evidence justifies such action, it may revoke the certificate of convenience and necessity of such public utility, or impose such other conditions upon such public utility as may be provided by law. Any such action by said public service commission shall be subject to review in the courts of this state in the same manner as other orders or decisions of said commission.

6. The courts of this state shall have power to enforce by injunction or other legal or equitable remedies any provision of this chapter or any rule or regulation prescribed by the governor hereunder. (L. 1947 V. I p. 358 § 21)

295.210 *Meaning of law.*—No employee shall be required to render labor or service without his consent; nor shall anything in this chapter be construed to make the quitting of his labor or services by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service without his consent. (L. 1947 V. I p. 358 § 22)

APPENDIX B

Excerpts From Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. § 141, et seq.)

SHORT TITLE AND DECLARATION OF POLICY

SECTION 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

FINDINGS AND POLICIES

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers

to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and member have the intent or the necessary effect of burdening

or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

* * *

[SEC. 8] (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or a

question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputs within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall

not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of section 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

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SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

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TITLE II—CONCILIATION OF LABOR DISPUTES IN INDUSTRIES AFFECTING COMMERCE; NATIONAL EMERGENCIES

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FUNCTIONS OF THE [FEDERAL MEDIATION AND CONCILIATION] SERVICE

SEC. 203. (a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one of more of the parties to the dispute, whenever in its juidgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a

minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

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NATIONAL EMERGENCIES

SEC. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

SEC. 207. (a) A board of inquiry shall be composed of a chairman and such other members as the President shall

determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

* * *

SEC. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

* * *

SEC. 209. (a) Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-

day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

SEC. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.